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Supreme Court, U.S.
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No. ___

In the
Supreme Court of the United States
October Term, 1992

INVENTION SUBMISSION CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1a. In a proceeding to enforce an administrative subpoena, does the respondent have the burden of showing that the material sought by the administrative agency has no relevance to the agency's investigation?

1b. May an administrative subpoena issued pursuant to a Federal Trade Commission resolution, in accordance with the provisions of the Federal Trade Commission Act, be enforced, where no valid reason has been proffered by the Commission, as to why the material to be subpoenaed is relevant to the purpose of its investigation, as set forth in its resolution?

1c. In a proceeding to enforce an administrative subpoena, where the only basis proffered by the agency for relevance of the subpoenaed material to its investigation is rejected by the court, is enforcement of the subpoena proper?

2. Is the United States Court of Appeals for the District of Columbia correct in the instant case, in determining that financial information is relevant to an investigation of possible misrepresentations under the Federal Trade Commission Act, or was the United States Court of Appeals for the Fifth Circuit correct in *FTC v. Turner*, in determining that financial information is not relevant to an investigation of possible misrepresentations under the Act?

3a. Where compliance with an administrative subpoena has been determined by a court not to be unreasonably burdensome, based on an agency's assurances as to the intended use of the subpoenaed material, is it error for the court to enforce the administrative subpoena, without incorporating the agency's assurances in its order?

3b. Is there a presumption of administrative regularity, such that, where an administrative subpoena is determined not to be unduly burdensome because of an agency's assurances regarding the use of the subpoenaed material, the subpoena may be enforced, although only the agency's unsupported assurances protect the respondent from undue burden?

LIST OF PARTIES

The parties in the proceeding below were the petitioner, Invention Submission Corporation, and the respondent, the Federal Trade Commission.

The parent company of Invention Submission Corporation is Technosystems Consolidated Corporation.

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INVENTION SUBMISSION CORPORATION,

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v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Invention Submission Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-titled proceeding on June 2, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reported at 965 F.2d 1086, is reproduced as Appendix A to this petition. The Orders of the Court of Appeals denying a timely petition for rehearing and suggestion for rehearing *en banc* are reproduced as Appendix B to this petition. The opinion, judgment and order of the United States District Court for the District of Columbia, reported at 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,331 (D.D.C. Feb. 13, 1991), are reproduced as Appendix C to this petition. The ruling of the

Federal Trade Commission is reproduced as Appendix D to this petition.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals was entered on June 2, 1992. On August 4, 1992, the District of Columbia Circuit denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The United States District Court for the District of Columbia had jurisdiction over this matter under 15 U.S.C. §57b-1 (e), (h). The United States Court of Appeals for the District of Columbia Circuit had jurisdiction over this matter under 28 U.S.C. §1291.

STATUTE AND REGULATION INVOLVED

Federal Trade Commission Act, 15 U.S.C. §§45(a), 57b-1.

Federal Trade Commission regulations at 16 C.F.R. §§2.1, 2.4, 2.5, 2.6 and 2.7.

The statute and regulations are reproduced as Appendix E hereto.

STATEMENT OF THE CASE

Petitioner is Invention Submission Corporation (ISC), a company engaged in the business of providing services to inventors. ISC's main service involves submitting its clients' inventions to various companies, including companies registered in its Data Bank, whose general areas of interest include these inventions, in the hope of obtaining a good faith review. Advertising is ISC's principal method of making potential clients aware of ISC's services, and is also extremely important in attracting companies to which ISC sends client inventions. ISC also relies on its contacts with businesses in submitting inventions. In its contacts with clients, ISC attempts to ensure that the clients fully understand the nature of ISC's services. In particular, ISC

emphasizes the fact that ISC does not promise profits to its clients, as invention services are a high-risk investment.

In April of 1988, the Federal Trade Commission (hereinafter "Commission") began its nonpublic investigation of ISC in order to determine whether ISC may have engaged in deceptive practices in violation of §5 of the Federal Trade Commission Act (hereinafter "FTC Act" or "Act"), 15 U.S.C. §45(a)(1). In response to the Commission's inquiries, ISC voluntarily submitted voluminous information to the Commission. However, ISC objected to some of the Commission's requests on various grounds, and therefore did not provide all requested information.

On December 29, 1988, the Commission issued a resolution authorizing the use of compulsory process in its investigation of ISC, in accordance with the FTC Act, 15 U.S.C §57b-1. The resolution states that the purpose of the investigation is as follows:

> "To determine whether Invention Submission Corporation, Martin Berger and others may have engaged in unfair or deceptive acts or practices . . . including but not limited to false or misleading representations made in connection with the advertising, offering for sale and sale of its services related to the promotion of inventions or ideas . . . [and] to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest."

On May 15, 1989, the Commission issued its administrative subpoenas, known as a Civil Investigative Demand for Written Interrogatories and a Civil Investigative Demand for Documentary Material (hereinafter called subpoenas), in accordance with the FTC Act, 15 U.S.C. §57b-1, and the regulations at 16 C.F.R. §2.7. The subpoenas were served on ISC on May 22, 1989. The subpoenas requested, *inter alia*, documents reflecting ISC's assets and financial status, and information which would permit the Commission to contact clients of ISC, companies registered in ISC's Data Bank, and advertising media used by ISC. ISC responded to the subpoenas on July 13, 1989. ISC objected to providing financial information on relevancy grounds, and objected

to providing contact information on clients, Data Bank registrants and advertising media based on reasonableness, because of the undue burden on ISC which would result from the Commission's contacts with these persons and entities. ISC provided substantial information requested by the Commission, in response to Interrogatories and Requests for Documents to which ISC did not object.

On July 31, 1989, ISC filed its Petition to Limit or Quash the Civil Investigative Demands, in accordance with 15 U.S.C. §57b-1(f) and 16 C.F.R. §2.7(d). After an administrative hearing on September 6, 1989, Commissioner Calvani, in a Ruling dated September 25, 1989, limited the subpoenas in some respects, but nonetheless required ISC to produce documents reflecting ISC's assets and financial status. Commissioner Calvani ruled that such financial information was relevant to the Commission's investigation because it would reflect a possible profit motive for any misrepresentations. Commissioner Calvani also ruled that ISC must produce or make available to the Commission information which would enable it to contact clients of ISC, advertising media used by ISC, and companies participating in ISC's Data Bank. On September 29, 1989, ISC petitioned the full Commission to review Commissioner Calvani's September 25, 1989, Ruling. The full Commission denied ISC's petition on October 10, 1989.

Based on continued objections, ISC did not provide all information sought by the Commission. On or about January 4, 1990, the Commission filed its Petition for an Order to Enforce Civil Investigative Demands with the United States District Court for the District of Columbia. A hearing on the Commission's enforcement petition was held before District Judge Royce Lamberth on March 27, 1990, at which counsel for ISC and the Commission made their arguments. On February 13, 1991, the court issued an Order enforcing the subpoenas. It is from this Order that ISC appealed to the United States Court of Appeals for the District of Columbia Circuit.

ISC argued before the District Court that the documents regarding its assets and financial status which were sought by the Commission were not relevant to the Commission's investigation of possible misrepresentations. Nonetheless, the court ruled that all information sought by the Commission was relevant, without stating any basis for its holding that ISC's financial information was relevant to the Commission's investigation.

In addition, ISC argued before the District Court that the Commission's contacts with ISC's clients, Data Bank participants and advertising media would be unduly burdensome to ISC, as these contacts would unduly disrupt and seriously hinder the normal operation of its business. The court incorporated in its Memorandum Opinion the Commission's assurances regarding limitations on its contacts with ISC's clients, Data Bank participants and advertising media, stating that these limitations would prevent the harm to ISC's business which ISC feared. However, the court did not order the Commission to abide by its assurances, so as to alleviate the burden on ISC.[1]

On May 31, 1991, ISC filed its Notice of Appeal with the United States District Court for the District of Columbia. Argument on ISC's appeal was held before a panel of the United States Court of Appeals for the District of Columbia Circuit on March 9, 1992. On June 2, 1992, the court issued its Opinion and Order, affirming the decision of the District Court. The District of Columbia Circuit stated that "profitability in and of itself does not suggest wrongdoing", effectively rejecting the Commission's only proffered basis for relevance of the financial information to its investigation. However, the District of Columbia Circuit upheld

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[1]ISC has complied with the Order of the District Court, and has produced all information here at issue. ISC and the Commission agree that ISC's compliance with the District Court's Order would not cause the controversy to become moot, as the Commission could be ordered to return or destroy the information which it has obtained. The District of Columbia Circuit agreed with the parties. In this regard, see, e.g., *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 (D.C. Cir. 1980).

the Commission's subpoena which requested this information, stating that Commissioner Calvani's "puzzling" statement concerning the relevance of "a possible profit motive" does not undermine the Commission's claim for enforcement of its subpoenas. The District of Columbia Circuit held that the financial information might facilitate the Commission's investigation in ways which may not be apparent, and that the information sought could therefore be relevant to the Commission's investigation. Further, the court imposed on ISC the burden of showing that the subpoenaed information was not relevant.

The District of Columbia Circuit also affirmed the District Court's decision requiring ISC to produce information on its clients, Data Bank registrants and advertising media, which would allow the Commission to contact these persons and businesses, although ISC argued that such contacts would prevent it from conducting its normal business operations. Nonetheless, the panel of the District of Columbia Circuit affirmed the District Court's decision, holding that the District Court did not err in failing to incorporate the Commission's assurances in its Order, so as to alleviate the undue burden on ISC. The court so held, in part based on its assertion that there is a generally applicable presumption of administrative regularity, entitling an administrative agency to have its assertions taken at face value.

ISC filed a Petition for Rehearing with a Suggestion for Rehearing En Banc on July 15, 1992. The United States Court of Appeals for the District of Columbia Circuit denied both the Petition for Rehearing and the Suggestion for Rehearing En Banc on August 4, 1992.

Presently, the Commission has been investigating ISC for approximately four and one half years, and this investigation is ongoing. The Commission has obtained voluminous material from ISC, both through voluntary production and through administrative subpoenas. To date, the Commission has not sued ISC for alleged misrepresentations in violation of the FTC Act, nor has it made allegations as to misrepresentations or deceptive practices by ISC.

It is not known when the Commission's investigation will end, or whether the Commission will take any action against ISC.

REASONS FOR GRANTING THE WRIT

This case presents important issues relative to the subpoena power of an administrative agency in the context of an investigation, and the limits on that subpoena power. Because of the effect of agency investigations on American business, the resolution of these issues as to the limits of agency subpoena power could have a wide-ranging impact on commerce in the United States.

Numerous federal agencies have statutory authority to conduct civil investigations, and to issue administrative subpoenas in conjunction with such investigations.[2] These powers were granted by Congress in order to facilitate the agencies' enforcement of various statutes, including the FTC Act. However, the business which is served with an administrative subpoena must often expend substantial time and funds in compiling information sought by the investigating agency, to the detriment of normal business activities. Such investigations are generally conducted in order to determine whether there were any violations of statutes, and accordingly, many of the businesses which are investigated will never be accused of wrongdoing. If the power of an agency to request information is unlimited, an agency investigation can disrupt a business' operations to the point of seriously damaging that business, even though the business has violated no laws. Further, given the number of government agencies with investigatory powers, agencies' activities in subpoenaing business records may

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[2]A partial list of the agencies with subpoena power includes the Equal Employment Opportunity Commission, under 29 U.S.C. §626 and 42 U.S.C. §2000e-9; the National Labor Relations Board, under 29 U.S.C. §161; the Environmental Protection Agency, under 7 U.S.C. 136d(d), 15 U.S.C. §2610(c); the Securities and Exchange Commission, under 15 U.S.C. §77s(b) and §77aa, 15 U.S.C. §78u(a-c); the Federal Home Loan Bank Board, under 12 U.S.C. §1730(m)(1 and 2); and the Internal Revenue Service, under 26 U.S.C. §§7602, 7603.

adversely affect the business climate and the economy of the United States. Accordingly, there must be some limits on the investigatory powers of administrative agencies, to protect businesses from unreasonable disruption of their normal operations, while still permitting administrative agencies to fulfill their statutory mandates.

Because of the potential adverse impact of administrative subpoenas on respondents, the courts have held that there are limits to agencies' subpoena powers, which include both statutory limitations and constitutional limitations imposed by the Fourth Amendment. Agencies are thereby prevented from issuing subpoenas which are unreasonable or which seek irrelevant information.

The panel of the United States Court of Appeals for the District of Columbia Circuit, in its decision in the instant case, has vitiated the protections accorded to businesses which are the subject of agency investigations. In its opinion in the instant case, the panel of the District of Columbia Circuit has weakened the relevancy and reasonableness limitations on administrative subpoenas to the point where they become meaningless.

In addition, in determining that financial information is relevant to the Commission's investigation of possible misrepresentations under the FTC Act, the panel of the District of Columbia Circuit has made a decision in conflict with the decision of another circuit court. See *Federal Trade Comm'n v. Turner*, 609 F.2d 743 (5th Cir. 1980).

If the District of Columbia Circuit's decision is not overturned, there will effectively be no limits on administrative agencies' subpoena powers. The lack of limitations on the scope of an investigating agency's discovery could burden businesses to the extent of causing some businesses to fail, because of the cost of producing documents or the harm to their operations as the result of an agency's use of subpoenaed information. It is contrary to precedent and the intent of Congress in authorizing administrative subpoenas, to permit administrative agencies to subpoena

information regardless of relevancy or whether production of the information sought will create an undue burden on the respondent.

ARGUMENT

A. The Administrative Subpoena Power Is Not Unlimited, And The Limitations Imposed On Administrative Subpoenas By The Courts Include A Relevancy Limitation

1. The History of Administrative Subpoenas

Until approximately one hundred years ago, the courts held that the subpoena power was strictly reserved to the judiciary. No administrative agency could subpoena a witness or documents, nor could Congress itself exercise the subpoena power, during most of the nineteenth century. See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168 (1881), in which it was held that the Constitution did not grant even to Congress the power to compel the testimony of a witness, but instead gave that power only to the courts.

In *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894), the Supreme Court for the first time held that administrative subpoenas are constitutional. In *Brimson*, the Supreme Court held that the ICC could issue subpoenas as part of its exercise of investigatory power delegated by Congress. However, in later decisions, the Court made it clear that the administrative subpoena power was severely limited. See, e.g., *Harriman v. Interstate Commerce Comm'n*, 211 U.S. 407, 419-421 (1908), in which it was held that an administrative agency could issue a subpoena only pursuant to a complaint, or to inquire into matters which might be made the subject of a complaint, i.e., only for the purpose of inquiring into a specific breach of the law, and not for general investigatory purposes.

The Court's holding in *Harriman* limiting the scope of administrative subpoenas was upheld for many years. See, e.g., *Federal Trade Comm'n v. Baltimore Grain Co.*, 284 F. 886 (D. Md. 1922), *aff'd* 267 U.S. 586 (1924) (the powers given to the

Commission by statute to investigate alleged antitrust violations did not encompass the power to subpoena documents, absent an allegation of wrongdoing). See also *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298 (1924) (Commission had no power to conduct a "fishing expedition" by subpoenaing documents based on the possibility that they might disclose evidence of a crime). And see *Jones v. Securities Exchange Comm'n*, 298 U.S. 1 (1936) (SEC was empowered to investigate only whether a stop order suspending a securities registration should issue, and had no general power to investigate).

During the early part of the twentieth century, the issuance of an administrative subpoena absent a specific allegation of wrongdoing was held to violate the constitutional rights of the respondent by impermissibly intruding into private affairs, and the courts during this period sought to prevent such intrusion. However, as noted by Professor Davis in his *Administrative Law Treatise*, at Vol. I, §4.1, p. 228, the effect of these rulings was to prevent administrative investigation of business records, and to frustrate the intent of Congress by preventing effective agency regulation of business.

As the role of government in American society expanded prior to and during the involvement of the United States in the Second World War, the limitations on administrative subpoenas were abandoned by the courts. In *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, 390 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940), the Seventh Circuit upheld an investigatory subpoena of the Labor Department, seeking employee records to investigate wage and hour violations. The Circuit Court determined that the intent of Congress in enacting the Fair Labor Standards Act was that the Labor Department should have the power to issue investigatory subpoenas, even if there was no allegation of a violation of the law. The court also held that the agency was entitled to examine records relating to all employees, even those employees whom the employer had determined to be exempt from the provisions of the FLSA. Although the case clearly was contrary to the precedent of that time, the Supreme Court denied certiorari.

Later Supreme Court cases followed the Circuit Court's holding in *Fleming*, establishing the power of an administrative agency to issue a subpoena for general investigative purposes. In *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), the Supreme Court upheld a Labor Department subpoena of employee records of a government contractor, to investigate wage and hour violations. The Court refused to limit the scope of the agency's investigation to employees whom the employer stated were working on government contracts, holding that the records sought were not plainly irrelevant to the agency's authorized investigation. Further, the Court held that the Labor Department's investigatory subpoena was valid, even though no specific violation of law had been alleged, and no complaint was yet contemplated. It was not clear whether *Endicott Johnson* applied only to government contractors with a contractual obligation to disclose records.

Finally, in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the Supreme Court held that administrative subpoenas issued for an investigatory purpose are constitutional where there is no specific allegation of wrongdoing. In this case, the Administrator of the Wage and Hour Division of the Department of Labor sought inspection of records of a newspaper in order to determine whether the newspaper had violated the Fair Labor Standards Act, which became effective in 1938. The Administrator had made no allegations against the newspaper, but rather sought access to the records in order to determine whether the law had been violated. The Court held that the statute permitted such inspection of records by the Administrator, and that the subpoena power granted by the statute encompassed the records sought. The Court held that the Administrator's exercise of the subpoena power was a valid exercise of powers which were properly delegated by Congress, and which were necessary for enforcement of a law enacted by Congress. In setting forth the standards for a valid administrative subpoena, however, the Court did not grant agencies an unlimited breadth of subpoena power. Instead, the Court held that certain limitations were required by the Fourth Amendment. In this regard, the Court held, as follows:

"It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. . . . The requirement of 'probable cause[']. . . is satisfied . . . by the court's determination that the *investigation is authorized by Congress, is for a purpose Congress can order*, and *the documents sought are relevant* to the inquiry. Beyond this, *the requirement of reasonableness . . . comes down to* [the requirement that] *specification of the documents to be produced* [must be] *adequate, but not excessive, for the purposes of the relevant inquiry*." *Id.* at 208-209 [Emphasis added]

Thus, the Supreme Court held that subpoenas may be issued by administrative agencies pursuant to an investigation, without the requirement of a specific allegation of wrongdoing. However, the Court made it clear that, in order to meet the requirements of the Fourth Amendment, an administrative subpoena must comply with a four part test: (1) the investigation must be authorized by Congress; (2) the purpose of the investigation must be lawful; (3) the documents sought must be relevant; and (4) the material sought must be reasonable.

In *Oklahoma Press*, the Court held that a respondent may not be subjected to unlimited examination of records, but that the examination must be limited by the agency's statutory purpose, as follows:

". . . [T]he basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection may rightfully be claimed. . . . They are . . . the interest of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in

the public interest. Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason." *Id.* at 213

In subsequent cases addressing the validity of administrative subpoenas, the Supreme Court continued to recognize that there must be limitations on agencies' subpoena power. In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Supreme Court upheld the Commission's order requiring salt companies to submit reports on sales and prices of salt, showing their compliance with a cease and desist order of a court of appeals. In ruling that the Commission was entitled to all information which it sought, the Court in *Morton Salt* held that the relevancy standard for administrative subpoenas is broad, holding that an administrative agency has a "power of inquisition", permitting the agency to "investigate merely on suspicion" and "inform itself as to whether there is probable violation of the law". *Id.* at 642-643. As to the limitations on administrative subpoenas, the Court held, as follows:

". . . [A] governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.' [citing *Oklahoma Press, supra.*]"

Thus, the Court in *Morton Salt* once again applied the four-part test of *Oklahoma Press*, in determining whether an administrative subpoena was valid.

In *United States v. Powell*, 379 U.S. 48 (1964), in which a taxpayer challenged an IRS subpoena of tax records, claiming abuse because the IRS had previously examined the records and the statute of limitations had passed, the Court again applied the *Oklahoma Press* standard to an administrative subpoena. The IRS

contended that it sought the tax records in order to determine whether there was fraud by the taxpayer, as to which there was no statute of limitations. The Supreme Court upheld the IRS subpoena, holding that the IRS was not required to show probable cause to suspect fraud, in order to obtain the records which it sought. The Court also held that, in order to obtain enforcement of the subpoena, the IRS Commissioner was required to make the following showing:

> "He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the steps required by the Code have been followed[.]" *Id.* at 57-58.

Thus, the Court in *Powell* made it clear that the agency seeking to subpoena information must make a showing that the subpoena is in accordance with the authorizing statute, and that the material sought is relevant.

It has been established law since 1946 that a government agency may issue an administrative subpoena for purposes of investigation. However, the courts have set limits on administrative subpoenas for the protection of persons and businesses who are required to respond to these subpoenas, in order to prevent agencies from conducting excessive examinations of business and personal records.[3]

2. The Relevancy Limitation in More Recent Cases

Since *Oklahoma Press*, *supra*, and *Morton Salt*, *supra*, courts have continued to hold that administrative subpoenas may be issued

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[3]As to the history of administrative subpoenas, see, e.g., 3 G. Mitchell, B. Mezines and J. Stein, Administrative Law, §20.01[1], pp. 20-4 to 20-13; 1 K. Davis Administrative Law Treatise, at §§4.1-4.2, pp. 225-232; J. Bagby, *Administrative Investigations: Preserving a Reasonable Balance Between Agency Powers and Target Rights*, 23 Amer. Bus. L. Jour. 319, 322-324 (Fall, 1985).

only subject to the limitations set forth in those cases. The standards set forth in *Oklahoma Press* have been applied by courts to administrative subpoenas issued under the FTC Act, and to subpoenas issued in accordance with many other statutes.

For example, in *United States Environmental Protection Agency v. Alyeska Pipeline Service Co.*, 836 F.2d 443 (9th Cir. 1988), the court considered whether the EPA had authority to subpoena documents and testimony as part of the investigation of a ballast water treatment plant under the Toxic Substances Control Act, to determine whether contaminated washings from tankers were being used as ballast water and were being dumped at the plant. The respondent challenged the subpoenas as beyond the EPA's authority. In determining whether the subpoena was valid, the court applied the following test:

> "The scope of the judicial inquiry in an . . . agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.
>
> * * *
>
> If the agency demonstrates the existence of these factors, the court should enforce the subpoena unless the party subpoenaed proves the inquiry is unreasonably broad or unduly burdensome." *Id.* at 446 [citations omitted]

The court, in this environmental regulation case, applied a standard of review of administrative subpoenas which was taken from an employment discrimination case, *EEOC v. Children's Hospital Medical Center of Northern Nevada*, 719 F.2d 1426 (9th Cir. 1983). Despite the differences in the statutes involved in the two cases, the court considered these same standards for validity of an administrative subpoena to apply in both cases. Given the EPA's broad authority to investigate potentially hazardous

substances, the court upheld the subpoenas as seeking relevant materials.

The *Oklahoma Press* standard is also applied to administrative subpoenas issued under the FTC Act, in order to determine whether such subpoenas are valid. In *Federal Trade Comm'n v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977), the Commission was investigating natural gas producers estimates of gas reserves, to determine whether they were purposely underestimating reserves to increase prices. The Commission issued a resolution authorizing the use of compulsory process, which stated that the investigation concerned all aspects of fossil fuel production and marketing. Pursuant to this resolution, the Commission issued a subpoena seeking information on the production, sales, customers, officers and subsidiaries of natural gas producers, as well as on reserve estimates, gas fields and pricing. The natural gas producers challenged the subpoenas, contending that only information on gas reserves was relevant to the investigation. The district court limited the subpoenas on this basis. In overturning the district court's decision, the District of Columbia Circuit held that the district court's determination as to relevancy was erroneous as a matter of law. Upon analyzing the material sought by the Commission in light of the resolution pursuant to which the subpoenas were issued, the District of Columbia Circuit determined that all material sought by the Commission was relevant to the investigation, as set forth in the resolution.[4]

Where an agency exceeds the subpoena authority granted to it by statute, or seeks irrelevant information, the courts will rule that the subpoena in question is invalid under the standard of *Oklahoma Press*, *supra*

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[4]The Court in *Texaco* also made the determination that the material requested in the Commission's subpoena was not unreasonable, as it would not be unduly burdensome to produce. 555 F.2d at 881-883. The standard for what is unduly burdensome is discussed further *infra*.

For example, in *Bowsher v. Merck & Co.*, 460 U.S. 824 (1983), the Supreme Court held that a formal demand for access to records by the Comptroller General, seeking information on government contractors' indirect costs, was invalid. The Court held that the statutory language permitting access to government contractors' records "directly pertaining" to price and production costs constituted a limitation on GAO access to contractors' records. The Court stated that, in determining what was a valid subpoena under the statute, it "must balance the public interest served by full GAO investigations against the private interest in freedom from officious government intermeddling in the contractor's private business affairs." 460 U.S. at 835. According to the Court it was not the intent of Congress that the GAO have access to indirect cost information from government contractors. In so interpreting the statute, the Court noted that the GAO itself had expressed the belief that it did not have the authority to subpoena information on indirect costs. While this case relied on the statutory language at issue, the Court did limit the subpoena power of an administrative agency in an attempt to avoid "officious . . . intermeddling". In so doing, the Court recognized the limits imposed on administrative subpoenas by *Oklahoma Press*.[5]

In *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982), an administrative law judge for the Environmental Protection Agency issued a subpoena at the request of a herbicide manufacturer, in the context of an adjudicatory proceeding regarding the cancellation of government approval of certain uses

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[5]This case involves a formal demand for access by the GAO under a contractual access clause and under statutory authority. The formal demand for access, which the agency sought to have enforced by a court, appears to be indistinguishable from an administrative subpoena. In determining that the GAO could not have access to documents other than those related to the direct costs of defense contractors, the Court made a ruling contrary to that in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), *supra*. In *Endicott Johnson*, the Court had ruled that the agency's access to a defense contractor's employee files could not be limited, even though the agency apparently did not have jurisdiction over some of the employees whose files were involved.

of a herbicide alleged to cause cancer. The subpoena sought research materials relative to not yet completed studies of animal toxicity of the herbicide at issue. The appeals court in *Dow* affirmed the district court's decision that the subpoena was invalid. Applying the standards of *Oklahoma Press*, *supra*, and *Morton Salt*, *supra*, the *Dow* court ruled that the material sought was not probative of the issue to be adjudicated, that is, the toxicity of the herbicide at issue, *inter alia*, because there was no conclusion as to toxicity yet, and some of the material sought was likely to concern areas of research which were not pursued. The court in *Dow* considered the need for the material sought to be outweighed by the burden on those being requested to produce it.

Thus, the Supreme Court and lower courts ruling on the validity of administrative subpoenas have utilized the criteria set forth in *Oklahoma Press*, *supra*, and *Morton Salt*, *supra*, under which material sought by an administrative subpoena must be relevant to a lawful purpose.

B. The District Of Columbia Circuit Has Erred In The Instant Case, In Ruling That The Financial Information Subpoenaed By The Commission Is Relevant To Its Investigation Of Possible Misrepresentations

1. The District Of Columbia Circuit Has Erroneously Ruled That The Respondent Has The Burden Of Proving That Information Sought By An Agency Subpoena Is Irrelevant, And, In Effect, That An Agency Need State No Reason Why Subpoenaed Information Is Relevant To The Agency's Investigation

In the instant case, the District of Columbia Circuit has ruled on the validity of the Commission's subpoena, issued under the authority of 15 U.S.C. §57b-1(c)(1), which provides that the Commission has authority to issue a subpoena when it believes a person may have information "relevant to unfair or deceptive acts or practices in or affecting commerce". The District of Columbia Circuit ruled that the determination of the District Court, which

held that the financial data sought from ISC by the Commission was relevant to the purposes of the Commission's investigation, was not clearly erroneous. In so ruling, the District of Columbia Circuit held that ". . . in light of the broad deference we afford the investigating agency, *it is essentially the respondent's burden to show that the information is irrelevant*". [Emphasis added]

Further, the District of Columbia Circuit in effect rejected the Commission's only rationale for relevancy of the subpoenaed information, that it might reflect a possible profit motive for any misrepresentations by ISC. In this regard, the Court stated, as follows:

> "Of course, profitability in and of itself does not suggest wrongdoing. One could assume just as readily that evidence of *loss* would tend to show that a company had an added motive to engage in deceptive practices."

Nonetheless, the court upheld the Commission's subpoena requesting this financial information.[6] The District of Columbia Circuit has held that the financial information sought from ISC by the Commission is relevant for purposes of the Commission's subpoena, even if the agency's rationale for relevance is rejected, so long as it "*could facilitate the Commission's investigation in different ways, not all of which may yet be apparent*". [Emphasis added]

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[6]The District of Columbia Circuit cited *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) for the proposition that the decision of the Commission as to relevancy of financial information to its investigation should be upheld as correct, even though the grounds for the decision were erroneous. However, *Chenery* is inapplicable to the present situation. Under *Powell, supra*, the Commission has the burden of making a showing as to why the material requested in its subpoena is relevant to its investigation. As its only basis for relevancy was rejected by the District of Columbia Circuit, the Commission has failed to meet its burden of proof. In applying *Chenery*, the Circuit Court has failed to recognize that the Commission is a party in this case, which must meet its burden of proof in order to prevail.

The District of Columbia Circuit's decision is contrary to *Oklahoma Press*, *supra*, which sets forth a relevancy limitation on administrative subpoenas. Further, the District of Columbia Circuit's decision is contrary to the holding of the Supreme Court in *United States v. Powell*, *supra*, in which the Court held that the agency must show that the investigation will be conducted pursuant to a legitimate purpose, that the information sought was relevant to the purpose of the investigation, that the agency did not already have the information, and that the statutory procedure was followed. 379 U.S. at 57-58. Clearly, under *Powell*, the agency had the burden of stating a reason why the subpoenaed material was relevant to its investigation.

Further, the District of Columbia Circuit's decision is in conflict with the decision of the Ninth Circuit in *Alyeska Pipeline Service Co.*, *supra*, in which the court held that the *agency* had to demonstrate that the subpoena was authorized, the procedural requirements were followed, and the evidence sought was relevant. 836 F.2d at 446, quoted *supra*. In the instant case, the District of Columbia Circuit has relieved the agency of the burden of making any showing of relevancy, and has placed upon the respondent the burden of proving that the subpoenaed information is not relevant to some unknown purpose of the agency. As it would be impossible to prove that an agency seeks irrelevant material, under the District of Columbia Circuit's attenuated relevancy standard, the target of an investigation could not withhold information on relevancy grounds under virtually any circumstances.

The District of Columbia Circuit's holding as to the relevancy of financial information, and the burden of proof as to relevancy, is not supported by the cases cited in the opinion. In support of its novel holding that the burden of disproving relevancy is on the respondent, the District of Columbia Circuit cites *Federal Trade Comm'n v. Texaco*, *supra*, 555 F.2d at 882. However, the court in *Texaco* held only that a respondent has the burden of proving that a subpoena is unreasonable. That case does not state that the respondent must disprove the relevancy of the material sought.

In holding that it is enough if the material sought by an agency "could facilitate the . . . investigation in different ways, not all of which may yet be apparent", the District of Columbia Circuit has essentially held that the agency issuing the subpoena need make *no* showing that the material which it seeks is relevant. No precedent supports the District of Columbia Circuit's decision. As stated above, the decision is contrary to the Supreme Court's decision in *Powell*, *supra*, and *Alyeska Pipeline*, *supra*.

Finally, the District of Columbia Circuit proffers its own explanation for relevancy of ISC's financial information to the Commission's investigation: that it might help the Commission to allocate its investigative resources among invention companies, so as to protect the greatest number of consumers from possible harm. However, under *Texaco*, "[t]he relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation as set forth in the Commission's resolution." 555 F.2d at 874. The Commission's resolution in the instant case states that the Commission is investigating ISC, Martin Berger and others, and not the entire invention industry. Accordingly, the Commission's need to choose among possible targets for investigation cannot be a basis for relevancy of ISC's financial information in this instance.[7]

The District of Columbia Circuit relies on *In re Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 702 (D.C. Cir. 1978), to support the relevancy of ISC's financial information to the Commission's investigation. However, the *Line of Business* case concerns the Commission's authority to gather general economic reports under §6(b) of the FTC Act, 15 U.S.C. §46(b),

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[7]The argument that ISC's profits might be relevant to assist the Commission in allocating its resources, so as to protect the largest number of consumers, is merely a reiteration of the "profit motive" argument which the District of Columbia Circuit itself has rejected. Further, the Commission has had complete access to ISC's client files, and has had access to files for each of ISC's regional offices. Thus, the Commission has other means of determining the number of clients served by each office of ISC, rather than obtaining financial records.

and in that case, the Commission issued a resolution authorizing the use of compulsory process under §6(b), for the purpose of gathering economic information in order to compile a data base on various corporations. The subpoenas in the *Line of Business* case were not issued under 15 U.S.C. §57(b), for the purpose of investigating possible violations of §5 of the FTC Act by one particular company. Accordingly, the scope of relevancy of subpoenaed material in the *Line of Business* case is considerably broader than in the instant case. This case involving the report-gathering powers of the Commission is not applicable to the question of whether ISC's financial information is relevant to the Commission's investigation of ISC.

The District of Columbia Circuit ruled that ISC must produce financial information in response to the Commission's subpoena, even though the agency offered no reason why this information is relevant to its investigation of possible misrepresentations. In fact, there is no apparent reason why this information is relevant to the Commission's investigation. Accordingly, the District of Columbia Circuit's ruling on the relevancy of financial information is erroneous.

The District of Columbia Circuit's holding in the instant case, if not overturned, would make it impossible for courts to review agency decisions as to the relevancy of administrative subpoenas. While a district court's review in cases involving the enforcement of administrative subpoenas is limited, the district court does not have a merely ministerial role in the enforcement of administrative subpoenas. *Oklahoma Press*, *supra*; *Morton Salt*, *supra*. The respondent is entitled to challenge the subpoena in an enforcement proceeding, by contending that the subpoena was not authorized by statute, was issued for an improper purpose, is unreasonable or seeks irrelevant information. *Powell*, *supra*, 379 U.S. at 58. The District Court, in turn, must determine whether the subpoena is valid, under the criteria set forth in *Oklahoma Press*, *supra*. See also *Dow Chemical*, *supra*, 672 F.2d at 1266-1267. However, there can be no challenge of a subpoena on relevancy grounds, and no effective judicial review, if the agency need offer no valid

reason for relevancy of the material sought. The District of Columbia Circuit's decision, if upheld, would effectively prevent challenges to agency subpoenas on relevancy grounds.

2. The District Of Columbia Circuit's Determination That Financial Information Is Relevant To The Commission's Investigation Of Possible Misrepresentations Is In Conflict With A Decision Of The Fifth Circuit

In *Federal Trade Comm'n v. Turner*, 609 F.2d 743 (5th Cir. 1980), the district court denied enforcement of an administrative subpoena, where the Commission sought information in order to determine whether a respondent had sufficient resources to make feasible an action for redress to consumers. The Commission had already determined that the respondent committed misrepresentations in violation of the FTC Act, and had issued a cease and desist order. The court in *Turner* analyzed the precedents as to relevancy of material sought by administrative subpoenas, including *Oklahoma Press*, *supra*, and *Morton Salt*, *supra*. The court then considered all bases on which financial information might be relevant to an authorized purpose of the Commission, and held that the financial information sought by the Commission was not relevant to the question of whether the law was violated. *Id.* at 745. The *Turner* court then held that 15 U.S.C. §57b did not give the Commission authority to subpoena information for the purpose of determining whether an action for damages was feasible.[8] Based upon *Oklahoma Press*, *supra*, the Fifth Circuit upheld the district court's decision that the Commission's subpoena should not be enforced, holding that "[b]ecause the subpoenaed information in this case is not relevant to any authorized FTC inquiry, the

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[8]It has been the Commission's position throughout these proceedings that it is not seeking financial information from ISC for the purpose of determining the feasibility of a redress action. The Commission has stated that it already has sufficient information to determine whether redress is feasible. See the Commission's Ruling, Appendix D to this petition. Thus, the authority of the Commission to subpoena financial information for purposes of determining the feasibility of redress is not at issue here.

public need for this information does not justify the pretrial invasion of Turner's privacy." *Id.* at 746. Thus, the court considered the subpoena requesting financial information to be beyond the Commission's authority.

The Commission itself previously interpreted the decision in *Turner* as precluding discovery of financial information by the Commission, either at the investigative stage, or at any time prior to entry of a judgment. In its unpublished ruling in *In re Rome Finance Co.*, File No. 862-3090 (March 25, 1988), reproduced as Appendix F hereto, the Commission limited an administrative subpoena so that it did not seek financial information, because financial information was not relevant to a determination of whether the respondent had violated the law, under *Turner*. The Commission has since changed its opinion as to the relevance of financial information to an investigation of possible misrepresentations, and has also changed its interpretation of *Turner*. The Commission now contends that *Turner* applies only in cases where financial information is sought for purposes of determining the feasibility of redress. See, e.g., the Commission's ruling in the instant case, *In re Invention Submission Corporation*, File No. 882-3060 (Oct. 10, 1989), reproduced as Appendix E hereto.

The District of Columbia Circuit is incorrect, in holding that *Turner* concerns only the question of whether the Commission may obtain financial information for purposes of a redress action. To the contrary, the court in *Turner* assessed all possible bases under which discovery of financial information might be permitted under the FTC Act. The District of Columbia Circuit's decision in the instant case, that financial information is relevant to an investigation of possible misrepresentations, is in conflict with the Fifth Circuit's decision in *Turner*.

C. The District Of Columbia Circuit Erred In Affirming The District Court's Ruling That The Commission's Subpoenas Are Not Unduly Burdensome

ISC has argued in this case that unlimited contacts by the Commission with its clients, Data Bank registrants and advertising media will be unduly burdensome to ISC. ISC contends that such contacts will place it under a cloud of suspicion, causing these persons and entities to cease dealing with ISC, and disrupting the normal operations of its business. The District Court considered the assurances of the Commission as to limitations on its contacts with these persons and entities to be sufficient to alleviate any burden on ISC, and therefore ruled that the subpoena was not unduly burdensome. However, the District Court did not incorporate the Commission's assurances in its Order, thereby providing ISC with no protection from undue burden as a result of producing the subpoenaed information.

The District of Columbia Circuit upheld the District Court's ruling, holding that an administrative agency is entitled to a presumption of administrative regularity and good faith, relative to its assertions with respect to its treatment of subpoenaed material. The District of Columbia Circuit held that the Commission's assurances "should be accepted at face value", i.e., that the Commission's assurances need not be incorporated in a court order. The District of Columbia Circuit stated that ISC has the option of returning to the District Court, if it later believes that the Commission has acted in bad faith by failing to abide by its assurances.

Under *Oklahoma Press*, *supra*, and *Morton Salt*, *supra*, an administrative subpoena must be reasonable, in order to comply with the requirements of the Fourth Amendment. In order to be reasonable, a subpoena must not be unduly burdensome to the respondent. There is undue burden where "compliance [with the subpoena] threatens to unduly disrupt or seriously hinder the normal operations of a business." See *Texaco*, *supra*, 555 F.2d at

882. A district court may modify the subpoena in order to avoid such an undue burden on the respondent. *Id.* at 881-882.

In the instant case, ISC has contended that producing the information which would permit the Commission to contact its clients, Data Bank registrants and advertising media will unduly disrupt and seriously hinder the normal operations of its business. This is so because the Commission's contacts will cause these persons and entities to cease dealing with ISC. However, ISC has been given no protection from the undue burden which will result from production of the subpoenaed material except the unsupported assurances of the Commission's investigative staff.[9] ISC has therefore been forced to accept as its only protection from undue burden, the assurances of a representative of its adversary in this proceeding. In the event that the Commission does not abide by the assurances of its staff, ISC has no option except to return to court after the anticipated harm has occurred, at which point the harm will be irremediable. This is tantamount to no remedy at all. Contrary to *Oklahoma Press*, *supra*, ISC has been made to comply with a subpoena which is unreasonable, without any modifications to alleviate the undue burden on ISC.

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[9]ISC is not certain that the assurances which it has been given by the Commission's staff are the assurances of the Commission. In relation to discovery issues which are not before the Court, the Commission filed with the District Court an affidavit of Pamela J. Wood, an attorney in the Boston Regional Office of the Commission, in which the following statement appears:

". . . ISC claims that 'the purpose of [the] investigation has been more narrowly defined by the Commission as an oral misrepresentations case.' . . . In support of this claim, ISC cites to my first Declaration filed with this Court [the District Court] and to remarks made by me at oral argument on ISC's Petition to Quash before Commissioner Calvani.

The scope of this investigation is defined by the Resolution accompanying the Civil Investigative Demands ('CIDs') which is the only document in which 'the Commission' has spoken on the issue[.]" [Citations omitted]

Thus, Ms. Wood, who was the source of the assurances made to ISC, has previously stated that she cannot speak for the Commission. This raises a question as to whether there is a certain procedure which must be followed, before the assurances of the Commission may be relied upon.

Further, the District of Columbia Circuit is incorrect in holding that there is a generally applicable presumption of administrative regularity, i.e., a presumption that an administrative agency will abide by its assurances relative to its use of subpoenaed material. The case cited by the court in support of its holding, *Federal Trade Comm'n v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966 (D.C. Cir. 1980), is inapposite. *Owens-Corning* involved an attempt by the respondents to prevent information from being disclosed as a result of a Freedom of Information Act request by a member of the public, or a congressional request. The respondents therefore sought to have protections from disclosure incorporated in a court order. The Commission had agreed to follow its normal confidentiality procedures with regard to these documents, as set forth in its Operating Manual, except where Congress or a court sought documents. However, in the event of a congressional or judicial request, where the Commission would be required to turn over the requested materials, the Commission agreed to provide ten days notice where possible. Under these circumstances, the Circuit Court refused to provide the respondents with additional protection for their confidential information. Initially, it is noted that the respondents sought to control the manner in which the agency released information to Congress, although there is case law which holds that an agency may not withhold information from Congress, or delay congressional access to information. 626 F.2d at 970. Thus, the respondents in *Owens-Corning* sought relief which neither the Circuit Court nor the agency had the power to grant. In addition, the respondents were challenging agency procedures for the release of confidential information which are set forth in its operating manual, and which were set up under the authority of the Freedom of Information Act. *Id.* at 969-971. In essence, the respondents were attempting to control access to documents, even though a statute governed such access. Further, as the court pointed out, a court could order disclosure of documents under the Freedom of Information Act, even where the agency denied access.

Owens-Corning applies the presumption of administrative regularity to the Commission's procedures for disclosure of information, as set forth in its Operating Manual. Nothing in this case mandates that the same presumption be applied to the unsupported assurances of the Commission's investigative staff. Further, in the instant case, unlike in *Owens-Corning*, the relief sought is clearly within the power of the court to grant. The District Court had the discretion to incorporate in its Order the Commission's assurances, which it relied upon in its opinion as sufficient to protect ISC from undue burden.

Owens-Corning does not support the District of Columbia Circuit's contention that there is a general presumption of administrative regularity, such that the unsupported assurances of the Commission's staff are sufficient to protect ISC from undue burden.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,
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Dated: November 2, 1992

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 9, 1992 Decided June, 2, 1992

No. 91-5174

FEDERAL TRADE COMMISSION

v.

INVENTION SUBMISSION CORPORATION,
Appellant

Appeal from the United States District Court
for the District of Columbia

(89cv00272)

Edward B. Friedman, with whom Arnold M. Friedman, Pittsburgh, Pa., Michael M. Eaton, Vienna, Va., and Lewis Rose, Washington D.C., were on the brief, for appellant.

Joanne L. Levine, Attorney, Federal Trade Commission, with whom James M. Spears, General Counsel, Jay C. Shaffer, Deputy General Counsel, and Ernest J. Isenstadt, Assistant General Counsel, Washington D.C., were on the brief, for appellee.

Before: Mikva, Chief Judge, Silberman and Williams, Circuit Judges.

Opinion for the Court filed by Circuit Judge Silberman.

Silberman, Circuit Judge: Appellant Invention Submission Corporation (ISC) challenges a district court order enforcing two civil investigative demands (CIDs), or administrative subpoenas,

issued by the Federal Trade Commission in the course of an investigation into possible unfair or deceptive trade practices. ISC contends that financial data sought by the Commission is irrelevant to the inquiry and that disclosure of other information would be "unduly burdensome" to its business operations. Appellant also contests the district court's denial of its discovery motion. We affirm.

I.

ISC is in the business of promoting other people's inventions. for a fee, it prepares "basic information packages" describing clients' inventions or ideas and submits those packages to companies in its "data bank" that might be interested in the new products. It also produces a catalog and runs an invention trade show.

After several state attorneys general and Better Business Bureaus received consumer complaints, the FTC began an investigation of ISC for possible violations of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1). When the corporation refused to comply with certain requests for information, the Commission issued a resolution authorizing the use of compulsory process. The resolution stated that the investigation's purpose was

> [t]o determine whether Invention Submission Corporation ... may be engaged in unfair or deceptive acts or practices... including but not limited to false or misleading representations made in connection with the advertising, offering for sale and sale of its services relating to the promotion of inventions or ideas ... [and] to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

Pursuant to 15 U.S.C. §57b-1(c)(1), which authorizes the FTC to issue CIDs for information "relevant" to possible section 5

violations, the Commission then sought from ISC, *inter alia*, financial data-including balance sheets, income statements, records reflecting annual gross sales, and information concerning the financial status of each ISC regional office-and the names and addresses of clients, advertisers, and the companies listed in the corporation's data bank.

The corporation petitioned the Commission to limit or quash the CIDs as irrelevant and unreasonable. In accordance with Commission rules, *see* 16 C.F.R. §2.7(d)(4), the petition was considered by a single Commissioner, Terry Calvani. Commissioner Calvani modified the CIDs in certain respects to make ISC's compliance easier, *see In re Invention Submission Corp.*, File No. 882-3060, at 5-8 (Sept. 25, 1989), but he rejected the corporation's other objections. He determined that the requested financial information was relevant to the FTC's investigation because the information might reveal "evidence of a possible profit motive for the alleged misrepresentations." *Id.* at 11-12. He also rejected ISC's claim that identification of its clients, advertisers, and data bank participants would be "unduly burdensome"-ISC's theory was that those contacted would assume the corporation had committed wrongdoing and would cease doing business with it-and therefore declined to impose any restrictions on the Commission's communications with those entities. *Id.* at 3-5. Full Commission review of Commissioner Calvani's ruling was denied. *See In Re Invention Submission Corp.*, File No. 882-3060 (Oct. 10, 1989).

When ISC failed to respond satisfactorily to the modified CIDs, the Commission petitioned the district court for enforcement. *See* 15 U.S.C. §57b-1(e). The corporation sought discovery, or, alternatively, an evidentiary hearing, to prove that certain specifications were overbroad. It alleged that FTC staff had indicated, in statements to the Commission and the court, that the scope of the investigation was confined to possible "oral misrepresentations" by ISC salespeople and that some of the information requested was irrelevant to that specific purpose. The court enforced the CIDs without expressly ruling on the discovery

request. It disposed of the basis for that motion, however, by holding that "[w]hen a conflict exists in the parties' understanding of the purpose of an agency's investigations, the language of the agency's resolution," rather than subsequent representations of Commission staff, controls. *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶69,338, at 65,351 (D.D.C. Feb. 13, 1991). Because the FTC's compulsory process resolution defined the investigation's purpose broadly, the court concluded that all of the material still being withheld-including, implicitly, the financial information-was relevant to the commission's inquiry. *See id.* at 65,351-52. The court also declined to restrict communications with potential witnesses. the Commission had asserted that it did not intend to contact most of the corporation's clients or data bank participants, that it had no present intention of contacting advertisers (though this might become necessary as the investigation developed), and that it would state in interviews that it was only "investigating the idea promotions industry generally." *Id.* at 65,352-53; *see also id.* at 65,352 n. 24. The court though such representations should allay ISC's fears. *See id.* at 65,353.

ISC moved to modify the court's order to require expressly that the Commission adhere to those assurances, and a Commission attorney reiterated them in writing. The corporation then dismissed its motion and complied with the CIDs, while reserving its right to challenge the district court's decision.[1]

II.

A.

It is well established that a district court must enforce a federal agency's investigative subpoena if the information sought is

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[1] ISC's compliance does not moot the controversy. As the parties pointed out in their briefs, if the subpoena were improper, the Commission could be ordered to return responsive materials and to destroy any records derived from them. *See, e.g., Office of Thrift Supervision, Dep't of Treasury v. Dobbs*, 931 F.2d 956, 958 (D.C.Cir. 1991); *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 (D.C.Cir. 1980).

"'reasonably relevant,'" *FTC v. Texaco, Inc.*, 555 F.2d 862, 872, 873 n. 23 (D.C.Cir.) (en banc) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950)), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2940, 53 L.Ed.2d 1072 (1977)-or, put differently, "'not plainly incompetent or irrelevant to any lawful purpose' of the [agency]," *id.* at 872 (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed. 424 (1943)); *accord United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C.Cir. 1987)-and not "unduly burdensome" to produce *Texaco*, 555 F.2d at 881. We have said that the agency's own appraisal of relevancy must be accepted so long as it is not "'obviously wrong.'" *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C.Cir.1980) (quoting *Texaco*, 555 F.2d at 877 n. 32).

That is not to suggest that the agency's internal determination of relevance is independently reviewable. The agency, in issuing a subpoena, has undertaken no final administrative action; a subpoena becomes an appealable final order only after the subpoenaed party refuses to comply and the agency requests and receives judicial enforcement. *See Office of Thrift Supervision, Dep't of Treasury v. Dobbs*, 931 F.2d 956, 957 (D.C.Cir. 1991). Thus, "[i]n a subpoena enforcement ..., the District Court can inquire into all relevant matters, unlimited by the scope of the agency's own inquiry, if any." *United States v. Exxon Corp.*, 628 F.2d 70, 77 (D.C.Cir.) (per curiam), *cert. denied*, 446 U.S. 964, 100 S.Ct. 2940, 64 L.Ed.2d 823 (1980). If the district court finds that the information sought by the agency is relevant, we will affirm unless that determination is "'clearly erroneous.'" *FTC v. Anderson*, 631 F.2d 741, 746 (D.C.Cir. 1979) (quoting *FTC v. Lonning*, 539 F.2d 202, 210 n. 14 (D.C.Cir. 1976)).

ISC challenges the specifications requesting financial material as irrelevant to the Commission's investigation into possible section 5 violations. Appellant relies virtually exclusively on the Fifth Circuit's comment in *FTC v. Turner*, 609 F.2d 743 (5th Cir. 1980), that "[t]he amount of [the subject's] assets is not relevant to an inquiry into whether a violation of the law exists." *Id.* at

745. This statement, however, is mere dictum for which the *Turner* court provided no explanation. The case presented the question whether the Commission, once it has issued a cease-and-desist order, can use an investigative subpoena to determine whether the respondent has sufficient resources to justify a civil damage action for consumer redress. Two judges on the panel agreed (over a strong dissent by Judge Brown) that, in those circumstances, the Commission, like a private plaintiff, "may not discover an opponent's assets until after a judgment against the opponent has been rendered." *Id.*

Here, the Commission has not yet even issued a complaint against ISC; we are thus not confronted with the narrow question decided by the Fifth Circuit-whether financial data can be obtained for the purpose of determining the feasibility of *redress*. And we agree with the district court, and other courts that have addressed the issue, see *FTC v. American Buyers' Network Inc.*, 1991-2 Trade Cas. ¶69,551 (D.Colo.,Aug. 19, 1991); *FTC v. International Diamond Corp.*, No. C-81-29 MISC, Mem.Op. at 6 (N.D.Cal. Jan. 4, 1982), that financial information can be relevant to a pre-complaint investigation into possible section 5 violations.

The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one. At the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint. *See Texaco*, 555 F.2d at 872. The requested material, therefore, need only be relevant to the *investigation*-the boundary of which may be defined quite generally, *see Carter*, 636 F.2d at 787-88; *Texaco*, 555 F.2d at 874 & n. 26, as it was in the Commission's resolution here.

In light of this restricted judicial inquiry, the district court's conclusion that ISC's financial information was relevant to the Commission's inquiry surely was not clearly erroneous. Financial data, including evidence of relative profitability, could facilitate the Commission's investigation of ISC in different ways, not all of

which may yet be apparent. Comparison of ISC's profits with those of other invention promotion companies, and of the revenues of the corporation's various regional sales offices with one another, for example, might help the Commission to allocate its limited investigative resources to protect the largest number of consumers from potential harm, *see Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 702 (D.C.Cir. 1978), as sales offices that used fraudulent techniques but generated little or no profit would likely be closed even without government intervention.

Of course, profitability in and of itself does not suggest wrongdoing. One could assume just as readily that evidence of *loss* would tend to show that a company had an added motive to engage in deceptive practices. Commissioner Calvani's puzzling statement concerning the relevance of "a possible profit motive," however, does not undermine the FTC's claim for judicial enforcement of the CIDs. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80, 87-88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). As we have already explained, the district court is not reviewing the internal determination of the agency.[2] And the Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation. *See Texaco*, 555 F.2d at 877. In these sorts of cases, in light of the broad deference we afford the investigating agency, it is essentially the respondent's burden to show that the information is irrelevant. *Cf. id.* at 882 ("The burden of showing that the request is unreasonable is on the subpoenaed party.") Appellant did not meet this difficult standard.

ISC alternatively claims that the identification of its clients, advertisers, and data bank participants will prove unduly burdensome. An administrative subpoena may be deemed unduly

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[2] For similar reasons, enforcement of the specifications for financial information is not, as ISC contends, improper on the ground that the Commission may have followed *Turner* in a prior decision. See In re Rome Finance Co., File No. 862-3090, at 3 (Mar. 25, 1988).

burdensome if "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Texaco*, 555 F.2d 882. It is argued that unrestricted Commission contacts with potential witnesses will "place ISC under a cloud of suspicion and speculation," thereby jeopardizing the corporation's business relationships. The difficulty with ISC's argument is that it could be made with respect to almost any investigation.

Appellant therefore further refines its claim. It contends that district court, when it enforced the specifications, relied on the Commission's assurances that communications would be limited and nonaccusatory, and therefore it should have incorporated those assurances into its order. A district court may "impose reasonable conditions and restrictions with respect to the production of the subpoenaed material if the demand is unduly burdensome." *Id.* at 881. But we do not think the district court erred when it did not impose the restrictions sought here. It was within the court's discretion to decide whether to freeze the government's representations into an order (particularly since it is by no means obvious that the representations were required). As we have so often said, "agencies are entitled to a presumption of administrative regularity and good faith," and "[w]ith no indication that the Commission will act cavalierly or in bad faith," its assertions with respect to the treatment of subpoenaed material should be accepted at face value. *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C.Cir.1980).[3] If appellant thought the Commission

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[3] Appellant makes a related First Amendment argument that restricted Commission contacts with its advertisers and data bank participants will lead those entities to suspect ISC of wrongdoing, which will cause them to cease doing business with the corporation, which will make it impossible for ISC to disseminate information about its services and about new inventions, which will have an impermissible chilling effect on the corporation's commercial speech rights. The district court characterized this argument as "far-flung," *Invention Submission Corp.*, 1991-1 Trade Cas. at 65,353 n. 26, and this seems to us generous. to state the argument is to show how attenuated it is. *Cf. University of Pennsylvania v. EEOC*, 493 U.S. 182, 199-200, 110 S.Ct. 577, 587-88, 107 L.Ed.2d 571 (1990). In any event, the harm ISC alleges will only occur if we

subsequently acted in bad faith, it could, of course, return to district court to seek appropriate relief.

B.

ISC, as part of its effort to "try the prosecutor," asserts that it had a right, which the district court denied, to discovery (or an evidentiary hearing) to probe whether certain specifications exceeded the scope of the commission's investigation. Such procedures are inappropriate in summary enforcement proceedings except in "'extraordinary circumstances.'" *Carter*, 636 F.2d at 789 (quoting *Exxon*, 628 F.2d at 77 n. 7). The moving party must make an "adequate showing that the agency is acting in bad faith or for an improper purpose such as harassment." *Aero Mayflower*, 831 F.2d at 1145; *see also SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1388 (D.C.Cir.) (en banc), *cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980).

Appellant contends it meets that standard because the Commission itself had limited its investigation to possible *oral* misrepresentations and therefore the identities of advertisers and data bank companies, which are unrelated to oral misrepresentations, were sought only to harass the corporation. It relies on several statements by Commission staff. FTC attorney Pamela Wood told Commissioner Calvani:

> [I]f a salesperson said that an invention would be displayed at a trade show, he was wrong, and that was a misrepresentation. That's exactly the sort of misrepresentation which we feel is the crux of this case.
>
> . . . .
>
> ... [T]he thing[s] we feel ... most strongly about receiving in their entirety are the client lists with

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presume that the Commission will not abide by its representations-which, as we said, we are unprepared to do.

> contact information because this is an oral misrepresentations case. There is very little question about that unless we find something we are not expecting to find.

And in a declaration submitted to the district court, Wood stated:

> [T]he Commission began investigating ISC in 1988 to determine whether the company was engaged in unfair and deceptive business practices.... One focus of the investigation is whether ISC's sales representatives sold its services through oral representations that differed from or substantially exceeded the statements in ISC's advertisements and brochures.

She also submitted to the court a memorandum written to Commissioner Calvani stating the FTC's view that individual interviews, as opposed to a consumer survey, would be necessary "because we are investigating allegations of oral misrepresentations."

The Commission's compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we have previously made clear that "the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence." *Carter*, 636 F.2d at 789. Regardless, we do not think the statements demonstrate that the inquiry was in any sense narrowed. That oral misrepresentations were "[o]ne focus" of the investigation-even if Commission staff deemed such practices the "crux" of the case-does not mean that the Commission was investigating *only* oral misrepresentations. The possibility that evidence of other violations might emerge was explicitly recognized. Because ISC has not even approached a showing that the Commission acted in bad faith, the district court's denial of the discovery motion was not an abuse of discretion. *See id.*

For the foregoing reasons, the enforcement order and the denial of ISC's discovery motion are affirmed.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5174 September Term, 1991
89-00272 (misc.)

Federal Trade Commission,

v.

Invention Submission Corporation,

Appellant

BEFORE: Mikva, Chief Judge; Silberman and Williams, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed July 15, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5174 September Term, 1991
(89-00272 (misc.)

Federal Trade Commission,

v.

Invention Submission Corporation,

Appellant

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT;
CONSTANCE L. DUPRE, CLERK
BY: Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Petitioner,	)	
v.	)	Misc. No. 89-272
INVENTION SUBMISSION CORP., Defendant.	)	(RCL)

MEMORANDUM OPINION

This case comes before the court on petitioner's motion for an order requiring defendant, Invention Submission Corporation, to comply with two civil investigative demands ("CID"s) issued by the Federal Trade Commission ("FTC"). After consideration of the briefs and affidavits submitted by both parties, the court holds for the petitioner and orders respondent to answer the outstanding CIDs.

FACTS

Invention Submission Corporation ("ISC") engages in nationwide sales of invention promotion services. Attracting customers through radio, television, and print advertisements, the company offers inventors two basic services: preparation of a "Basic Information Package" which describes the customer's idea and, for an additional fee, submission of the inventor's idea to the business community. To facilitate the matching of investors' ideas with industry sponsors, ISC maintains a "Data Bank" of "manufacturers interested in new ideas."[1]

In April, 1988, in response to consumer complaints lodged

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[1] "Information: For Inventors, Innovators and Idea People," Brochure, Exhibit 3 of FTC's Reply Memorandum in Support of Petition to Enforce Civil Investigative Demands.

with attorneys general and Better Business Bureaus of several states, the Federal Trade Commission began investigating ISC for possible violations of Section 5(a) of the FTC Act.[2] As part of its investigation, the FTC wrote to ISC asking the company to supply the Commission with information relating to its business practices. ISC voluntarily provided some of the requested information, but refused to divulge certain records, including financial statements, the home address and phone numbers of employees, and the names and addresses of customers and participants in its Data Bank of industry evaluators.

Stymied by ISC's refusal to comply voluntarily, the FTC issued a resolution on December 29, 1988 authorizing the use of compulsory process in the investigation.[3] Five months later, under the authority of the Commission's resolution, the FTC presented to ISC two civil investigative demands, one requesting documentary material (CIDD) and one requesting answers to interrogatories (CIDI). After obtaining several extensions, ISC offered some production in partial compliance with the CIDs and subsequently filed with the Commission a petition to limit or quash the subpoena.[4] After oral hearings on the petition, Commissioner Terry Calvani issued an order modifying the CIDs in response to some of ISC's objections and ordered ISC to comply with the remaining requests.[5] After ISC persisted in refusing to respond

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[2] 15 U.S.C. §45(a)(1)(1988) holds that "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

[3] *See* Exhibit 2 to FTC's Memorandum of Points and Authorities in Support of Petition For An Order to Enforce Civil Investigative Demands.

[4] *See* Exhibit 1 to FTC's Memorandum of Points and Authorities in Support of Petition For An Order to Enforce Civil Investigative Demands at ¶¶12 - 17.

[5] *See* Petition for an Order to Enforce Civil Investigative Demands, Exhibit 8. ISC's petition for full Commission review of commissioner Calvani's decision was denied. *See* Petition for an Order to Enforce Civil Investigative Demands, Exhibit 10.

fully to the CIDs, FTC brought suit in this court[6] seeking an order compelling respondent to produce the requested information.

ANALYSIS

From the outset, it is important to put at rest an issue addressed by both petitioner and respondent -- the proper standard of judicial review and the court's role in enforcing agency subpoenas. The law on this issue is well-established: so long as the agency acts within its authority, requests information relevant to the lawful inquiry, and makes reasonable demands, the court must uphold the validity of the administrative subpoena.[7]

In this case, respondent ISC objects to the FTC's information requests primarily on relevance, reasonableness, and preservation of confidentiality grounds. ISC contends that much of the information is irrelevant to FTC's inquiry and that, absent restrictions and/or safeguards, production of the information will seriously disrupt respondent's business. Assessing ISC's objections to the CID specifications in light of the limited role which courts play in agency compulsory process actions, it is clear that the court must enforce the FTC's information demands.

A. Relevance

In evaluating relevance objections to agency investigations, a court must respect the agency's "power of inquisition"[8] and interpret relevance broadly. For, unlike a court which gathers information only as it relates to issues relevant to the litigation at hand, an agency in its acquisition of facts is not bound by the parameters of a particular case or controversy. An agency can inquire "merely on suspicion that the law is being violated, or even

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[6] The court has jurisdiction to enforce the Commission's CIDs pursuant to §20(e) and (h) of the FTC Act, 15 U.S.C. §57b-1(e), (h) (1988).

[7] *See United States v. Morton Salt Co.*, 338 U.S 632, 652 - 63 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946).

[8] *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

just because it wants assurance that it is not."[9] Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

In this case, FTC in its resolution authorizing the use of compulsory process, describes the scope and nature of the investigation in broad terms:

> To determine whether Invention Submission Corporation, Martin Berger, and others may be engaged in unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, as amended, including but not limited to false or misleading representations made in connection with the advertising, offering for sale and sale of its services relating to the promotion of inventions or ideas. The investigation is also designed to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.[10]

Despite the expansive language of the FTC resolution, ISC contends that the commission, in oral argument, narrowed the scope of the investigation simply to "oral misrepresentations"[11]

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[9] *Id.* at 642 - 43. *See Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 702 (D.C. Cir. 1978) (stating "The FTC's authority to require reports under Section 6(b) is not limited to pursuing a focused theory of unlawful activity.")

[10] Exhibit 2 to FTC's Memorandum of Points and Authorities in Support of Petition For An Order to Enforce Civil Investigative Demands.

[11] ISC's Memorandum of Points and Authorities in Opposition to Petition for an Order to Enforce Civil Investigative Demands at 38.

and that in this context, seven of the CID requests[12] are overly inclusive and irrelevant.

FTC does not deny that one focus of its investigations is oral misrepresentations, however, in its Reply Memorandum in Support of Its Petition for Enforcement of Civil Investigative Demands, the FTC flatly denies that the scope of the investigation was ever officially or unofficially limited to oral misrepresentations.[13] When a conflict exists in the parties' understanding of the purpose of an agency investigation, the language of the agency's resolution must govern.[14] Measured against this general statement of the purpose of the investigation, the court is satisfied that all of FTC's unmet information demands are relevant.

B. Burdensomeness

ISC argues that even if the relevance threshold is met, the CIDs should not be enforced because compliance with the FTC's requests would be unduly burdensome, disrupt normal business operations, and damage ISC's reputation. The governing standard in this circuit with respect to burdensomeness challenges is, however, a difficult one to meet: "the question is whether the demand is *unduly* burdensome or *unreasonably* broad."[15] Applying this test to ISC's objections, this court finds that respondent has failed to meet its burden of demonstrating that the agency's subpoenas are unreasonable.

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[12] *See* CIDI 12, 13 and 14; CIDD 1, 2, 3, 12(b). In its Response to the FTC's Reply Memorandum in Support of its Petition for Enforcement of Civil Investigative Demands, ISC raises relevance objections to CIDI specifications 6 & 18 and CIDD specification 10. Because these objections were not raised below, the court has no authority to rule on ISC's relevance arguments with respect to these three specifications.

[13] *See* FTC's Reply Memorandum in Support of Its Petition for Enforcement of Civil Investigative Demands at 15 - 16.

[14] *See FTC v. Texaco*, 555 F.2d 862, 874 (D.C., Cir. 1977).

[15] *Id.* at 882 (emphasis in the original).

Respondent ISC makes two basic types of burdensomeness objections. With respect to CIDI specifications 13(a) and 13(b) and specifications 4 and 6 of CIDD, ISC argues that compliance would be extremely costly, labor intensive, and in certain cases, impossible.[16] ISC estimates, for instance that the cost of complying with CIDI specification 13 will exceed $20,000[17] and that production of information in response to CIDD specifications 4 and 6 would require ISC to engage in a time consuming poll of "every person who works for or is associated with Invention Submission Corporation."[18]

Although respondent does raise legitimate concerns, this court does not find the time and labor costs of compliance to be unreasonable. Bearing in mind that the standard of burdensomeness "is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose,"[19] and the fact that Commissioner Calvani significantly lightened ISC's burden of production by modifying several of the specifications,[20] the court finds that ISC's assertions of unreasonableness are unmerited. The court finds that any

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[16] ISC originally objected to 19 specifications on the grounds of burdensomeness. See CIDI: 5, 6, 10, 12, 13, 14, 18, 19, 21, 22; CIDD 4, 5, 6, 7, 8, 9, 10, 11, 12. In its Memorandum of Points and Authorities in Opposition to Petition for an Order to Enforce Civil Investigative Demands, however, ISC concedes that in light of the Commissioner's ruling of September 25, 1989, easing ISC's production burden, it objects only to three specifications (CIDI 13 and CIDD 4 and 6) on burdensomeness grounds. *See* Memorandum of Points and Authorities in Opposition to Petition for an Order to Enforce Civil Investigative Demands at 27.

[17] *See* Affidavit of Pamela Gibeau, Exhibit G to Exhibit 7 of FTC's Petition for an Order to Enforce Civil Investigative Demands.

[18] Memorandum of Points and Authorities in Opposition To Petition For an Order to Enforce Civil Investigative Demands at 30.

[19] *FTC v. Texaco*, 555 F.2d at 882.

[20] *See* Ruling of Commissioner Calvani, Exhibit 8 to FTC's Petition for an Order to Enforce Civil Investigative Demands at 5 - 8.

remaining costs to which respondent objects are simply unavoidable expenses "necessary in furtherance of the agency's legitimate inquiry and the public interest."[21]

ISC posits a second type of burdensomeness argument with respect to CIDI specifications 1, 2(d), 4, 5, 6, 10, 12, 13, 14, 18, and 19 and CIDD specifications 3, 5, 7, 8, 10, and 11 which ask respondent to provide the names and addresses of regional sales staff, employees, managers, clients, and advertising media representatives. With respect to these requests, ISC contends that unless safeguards are imposed, persons contacted by the FTC "will assume that respondent is operating in a deceptive manner"[22] and cease doing business with the company.[23]

Although respondent envisions a doomsday scenario in which overzealous investigators ask leading questions and plant seeds of distrust and suspicion in the minds of interviewees, the court is convinced that plaintiff's apprehensions are unfounded and insufficient to overcome the FTC's presumptive right to access to individuals and records. First, FTC has averred that it does not intend to contact most of ISC's clients, employees, or databank participants,[24]thereby deflating ISC's projections of widespread

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[21] *FTC v. Texaco*, 555 F.2d at 882.

[22] Memorandum of Points and Authorities in Opposition to Petition for an Order to Enforce Civil Investigative Demands at 9.

[23] ISC makes an additional objection with respect to requests for home addresses and telephone numbers of employees. Respondent argues that providing FTC with this personal information would constitute an invasion of privacy and asks the court to insist that interviews be conducted at the workplace. The court refuses to limit the Commission's investigation in this way. Agencies have discretion to fashion how investigations are conducted. Since employees will not speak freely if they are under the watchful eye of management, the agency's desire to conduct interviews away from the workplace is neither arbitrary nor an abuse of discretion.

[24] *See* FTC's Reply Memorandum in Support of Its Petition for Enforcement of Civil Investigative Demands at 8. Despite its intention to interview only a limited sampling of clients, employees, and database participants, the court agrees

damage to the business. Second, the agency has stipulated that in conversations with customers and databank participants, it will state that the Commission is investigating the idea promotions industry generally and that no specific accusations of wrongdoing have been made.[25] These prefatory remarks recharacterizing the nature of the investigation should allay ISC's fears of false incrimination. Finally, the court rejects ISC's objections on policy grounds. If this court were to acknowledge ISC's highly speculative fears of damage to corporate reputation as adequate to defeat the agency's information requests, the FTC's subpoena power would be rendered powerless and serious investigation of corporate behavior would be a futile exercise.[26]

C. CONFIDENTIALITY

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with the FTC that full lists should be complied and submitted in order to allow the agency to poll a statistically valid sample. *See* FTC's Supplemental Memorandum in Response to Invention Submission Corporation at 3 - 5. FTC has also proffered that at this time, it does not plan to contact advertisers directly but needs a list of advertisers to determine whether ISC has targeted particular geographic areas or types of customers. *See* Second Declaration Under Penalty Memorandum in Support of Petition to Enforce Civil Investigative Demands at ¶26.

[25] *See* Second Declaration Under Penalty of Perjury of Pamela J. Wood, Reply Exhibit 1 at ¶24 and Exhibit A.

[26] In its Memorandum in Opposition to Enforcement at 10 - 12 and Response to the FTC's Reply Memorandum in Support of Its Petition for Enforcement of CIDs at 8 - 12, ISC advances a far-flung first amendment argument which the court need not consider at length. Respondent argues that if FTC investigators were to contact media and advertisers, these businesses would regard ISC with suspicion, refuse to run ISC advertisements, and thereby curtail ISC's first amendment speech rights. Respondent's effort to prevent FTC contact the advertisers and media on first amendment grounds clearly misses the mark. In this case, no formal government-imposed speech restrictions are at issue. ISC merely speculates that FTC interviews with media might incidentally create for ISC some difficulties advertising its services. Conjecture is, however, insufficient to create a first amendment obstacle to subpoena enforcement.

1. Confidentiality Agreements

ISC asks for complete exemption from responding to specifications 14 and 19 of the CIDI and specifications 7 and 11 of the CIDD on the grounds that compliance would require ISC to breach its confidentiality agreement with its inventor-clients and result in damage to ISC's goodwill and its customers' ability to secure patents.[27] In the alternative, respondent asks the court to order FTC to obtain from ISC clients written waivers of the confidentiality agreements prior to ISC release of the subpoenaed information.

ISC's first request for total exemption from the three specifications on the basis of confidentiality agreements is easily dismissed. Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.[28] As the FTC points out in its petition, any other state of affairs would undermine the Commission's mandate to investigate unfair business practices and allow any organization under investigation to escape scrutiny simply by protecting all information under confidentiality agreements.[29]

ISC's second request, a court-ordered requirement that FTC

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[27] ISC's confidentiality and non-use agreement with inventors binds ISC not to disclose inventions without the client's permission. *See* Affidavit of Donna Burrelli, Exhibit M of Exhibit to FTC's Petition for an Order to Enforce Civil Investigative Demands.

[28] *See FTC v. Tuttle*, 244 F.2d 605 (2nd Cir. 1957), *cert. denied* 354 U.S. 925 (1957).

[29] *See* Memorandum of Points and Authorities in Support of Petition for an Order to Enforce Civil Investigative Demands in an Investigation by the FTC at 14.

obtain the consent of ISC clients prior to the release of information covered under the existing confidentiality agreements, warrants more careful judicial consideration than respondent's first entreaty, but in the final analysis, respondent's second request must also be rejected.

The court begins with the premise that the formulation of procedures for safeguarding confidentiality should be set by the agencies, and not by the courts.[30] The Commission is not required, either by statute or by its own regulations to seek pre-investigation waivers of a company's confidentiality agreement. As FTC explains in its reply memorandum, waivers are both unnecessary and impractical at this time. First, asking for waivers will notify customers that the company is being investigated. Since not all investigations result in the issuance of a complaint, informing customers at this preliminary stage may cause unnecessary alarm. More importantly, the implementation of a waiver requirement would seriously hinder the Commission's investigations. As the Commission points out "[T]he waiver process would delay the investigation while staff waited for customers' responses to the waiver requests, delay it further waiting for ISC to release information, and permanently prevent disclosure if staff received no response from a client."[31]

Although both of ISC's requests for court protection for confidential client-inventor information have been rejected, the court's rulings do not leave respondent's confidential data nakedly exposed or preclude ISC from pursuing protection for confidential information at a later date. First, the ISC investigation is a non-

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[30] *See FCC v. Schreiber*, 381 U.S. 279, 290 (1965).

[31] FTC's Reply Memorandum in Support of Its Petition for Enforcement of Civil Investigative Demands at 10. In addition, a waiver procedure would allow ISC to monitor the FTC's investigations since the Commission would have to submit the waivers to ISC in order to obtain release of a client's information. *See id.* at 9.

public inquiry.[32] As such, there has been no public notice of the investigation underway nor publication of the kind of information being sought from ISC. Moreover, the FTC Act itself expressly forbids public disclosure by the Commission of confidential information obtained by CIDs.[33] If at some point, information will become public, respondent may move for a protective order barring public disclosure of confidential information.[34]

Second, the Commission, in its Reply Memorandum, offers respondent assurances that if confidential commercial information will be used in future litigation, the FTC will either file the information under seal or give ISC or its customers an opportunity to seek protection.[35] In light of statutory protections and FTC's offer to inform ISC in case of the possibility of public disclosure, court intervention at this point would be inappropriate.

2. Lawsuit materials

A second category of documents which ISC refuses to divulge on the grounds of confidentiality is information relating to lawsuits filed by or against ISC.[36] In his September 25, 1989 ruling, Commissioner Calvani ordered ISC to produce all records relating to suits against ISC with the exception of court documents under

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[32] *See* Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, Exhibit 2 to FTC's Petition for an Order to Enforce Civil Investigative Demands.

[33] *See* §6(f) and 21(b), (f) of the FTC Act, 15 U.S.C. §§46(f), 57b-2(b)&(f); *see also* 18 U.S.C. §1905 (1988). These statutory requirements are reinforced by Commission Rules 16 C.F.R. §4.10 (a)(2)(6)&(9) (1990).

[34] *See* 15 U.S.C. §57b-2(d)(2) and Commission Rule 16 C.F.R. §4.10(g), 16 C.F.R. §4.10(g)(1990).

[35] *See* FTC's Reply Memorandum in Support of Petition for an Order to Enforce Civil Investigative Demands at 10.

[36] CIDD 3 requires ISC to submit "documents pertaining to any law suits [sic] filed by or against ISC: petitions, complaints, answers, agreed judgments, consent agreements, orders and judgments."

seal. To the extent that ISC has failed to produce documents responsive to this ruling,[37] it is ordered to do so.

The FTC makes special mention of a case sealed subsequent to the Calvani decision. ISC argues that the sealing of the case was not prohibited by the Commission's ruling and takes issue with FTC's assertion that the company purposely "disabled" itself from complying with the CIDs.[38] Even accepting as true ISC's contention that "the opposing party in that lawsuit had valid reasons why it may have wished the record sealed,"[39] the court cannot ignore the fact that post-subpoena sealing of documents significantly impedes FTC's ability to investigate ISC's operations. Since the court cannot countenance actions which result in process avoidance, even if they were not taken to evade compliance, the sealed lawsuit materials shall be produced.[40]

CONCLUSION

In sum, respondent ISC has failed to offer the court any evidence to suggest that in issuing the two CIDs, the agency has abused its investigatory powers. At this pretrial, investigatory stage, the agency needs and has the right to gather all information which will be useful in making a determination of whether a prosecution of ISC will serve the public interest. Although some of the information which FTC requests may ultimately prove unuseful or irrelevant, at this preliminary investigatory stage, the

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[37] *See* FTC's Reply Memorandum in Support of its Petition for Enforcement of Civil Investigative Demands at 21.

[38] *See* ISC's Response to the Federal Trade Commission's Reply Memorandum in Support of Its Petition for Enforcement of Civil Investigative Demands at 18-19.

[39] *Id.* at 19.

[40] Pursuant to the Court's authority under Fed. R. Civ. P. 37, defendant ISC is ordered to request from the court which sealed the documents permission to show the records to the FTC. *See United States ex. rel. Woodard v. Tynan*, 776 F.2d 250, 252 (10th Cir. 1985).

court finds FTC's CID specifications to be appropriate. The court is not convinced that compliance will unduly burden ISC and finds respondent's other objections to compliance to be without merit.

Royce C. Lamberth
United States District Court

Date: Feb 13, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Petitioner,	)	
v.	)	Misc. No. 89-272 (RCL)
INVENTION SUBMISSION CORP., Defendant.	)	

ORDER

Upon consideration of plaintiff's petition for an order to enforce civil investigative demands and defendant's papers in opposition, it is hereby ORDERED that:

(1) Plaintiff's petition is GRANTED.

(2) Defendant is ordered to comply with the Commission's CIDs within twenty days of the entry of this order.

(3) Defendant is ordered to petition the appropriate court for release of any records sealed after Commissioner Calvani's ruling of September 25, 1989 that would comply with the Commission's CIDs.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Date: February 13, 1991

FEDERAL TRADE COMMISSION
Washington D.C. 20580

Office of the Secretary

September 25, 1989

Edward B. Friedman, Esquire
Friedman & Friedman
900 Fifth Avenue

Pittsburgh, PA 15219

Re: Petition to Limit or Quash CIDs for Written Interrogatories and Documentary Materials Invention Submission Corp., file No. 882-3060

Dear Mr. Friedman:

This is to advise you of the Federal Trade Commission's response to the Petition to Quash or Limit CIDs ("Petition") that you filed on behalf of your client, Invention Submission Corp. ("ISC") in the above-captioned matter.

The ruling set forth herein has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4), 16 C.F.R. §2.7(d)(4) (1989). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984). Pursuant to Rule 2.7(f), 16 C.F.R. §2.7(f), within three days after service of this decision, the petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifiess.

The Petition is granted in part and denied in part of the reasons stated below:

I. Background

On December 29, 1988, the Commission issued a resolution authorizing the use of compulsory process in its investigation of ISC. The resolution states that the purpose of the investigation is to determine whether "Invention Submission Corporation, Martin Berger, and others may be engaged in unfair or deceptive acts or practices...including but not limited to false or misleading representations made in connection with the advertising, offering for sale and sale of its services relating to the promotion of inventions or ideas." The investigation also seeks "to determine whether Commission action to obtain redress to consumers or others would be in the public interest." Resolution, December 29, 1988. The CIDs were issued on May 15, 1989, with a return date of June 8, 1989. After obtaining several extensions, ISC produced a partial response on July 13, 1989.

On July 31, 1989, ISC filed its Petition to Limit or Quash CIDs, designating the entire Petition confidential. ISC refiled the Petition on August 9, 1989 designating only portions confidential.[1] In brief, the Petition challenges numerous specifications contained in the Civil Investigative Demands for both Written Interrogatories and Documentary Materials. ISC's objections can be grouped into four arguments:

(1) specifications calling for the names, addresses and phone numbers of potential witnesses are unreasonably burdensome absent safeguards limiting staff's ability to contact such witnesses;

(2) other specifications are unduly burdensome inasmuch as production would require an unreasonable amount of time and

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[1] The Office of the Secretary informed ISC's counsel that the Commission would most likely deny a blanket request for confidentiality, consistent with the Commission Rules treating Petitions to Quash as public documents. See Section 2.7(g) and 4.9(b)(4) of the Commission's Rules, 16 C.F.R. §§2.7(g) and 4.9(b)(4) (1989). the Commission partially granted ISC's confidentiality request on August 24, 1989.

expense; (3) several specifications seek irrelevant material; and (4) production would require ISC to violate certain confidentiality agreements.

Commissioner Calvani has carefully reviewed the Petition and accompanying exhibits. He has also considered the argument at the hearing conducted on September 6, 1989. Petitioner's objections are discussed below.[2]

II. Specific Objections

A. Absent Safeguards, Producing the Names, Addresses and Phone Numbers Of Potential Witnesses Is Unreasonably Burdensome

ISC claims that providing the names and addresses of potential witnesses, *i.e.*, regional sales staff, employees, managers, clients and advertising media representatives, without any safeguards on the use of the information, is unduly burdensome and oppressive.[3] In affidavits submitted with its Petition, ISC maintains that absent safeguards, production will disrupt ISC's ongoing relationships with employees and clients, mislead such individuals into believing that a complaint has been filed against ISC and that they may be named personally, and lead to mass resignations. *See, e.g.*. Pet. Exhibits B, C. ISC also claims that unrestricted contact will place ISC under a cloud of suspicion which will adversely affect its operations. Pet. at 23-26. ISC cites to portions of a pretrial order in *Horizon Corporation*, 97 FTC 464 (1981), referring to Judge Barnes' earlier requirement that complaint counsel obtain his

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[2] The following abbreviations are used throughout this letter:

Petition, page number -	Pet. at
Petition, Paragraph -	Pet. Par.
CID for Written Interrogatories -	DWI
CID for Documentary Materials -	DDM
CID Specification -	Spec.
Transcript -	Tr.

[3] *See, e.g.*, Pet. Pars. 1-4.

permission prior to contacting respondent's customers. *Horizon*, D. 9017 C slip. op. (March 7, 1978) (order denying motion to restrict contracts). ISC argues that the Judge permitted unrestricted contacts only for the limited purpose of preparing for cross-examination of such customers at trial. Pet at 24. ISC cites no other authority to support its request to quash or limit specifications seeking employee, client and customer information on grounds of undue burden.[4]

At the outset, we note that any investigation in which government counsel seek to question a respondent company's clients and employees is likely to intrude somewhat upon that company's affairs. On the other hand, precluding such contacts would seriously undermine any investigation. In this instance, among other things, the staff seeks evidence on whether ISC's salespersons may have made oral statements that were inconsistent with some of the company's official written disclaimers. Tr. at 80. Staff asserts that it is entitled to interview ISC employees, customers and business clients to learn what sales people actually said. *See* Tr. at 96-97.[5]

We are reluctant to limit staff's ability to contact individuals with relevant evidence. We believe ISC's claims of injury are not outweighed by the legitimate need to contact potential witnesses.

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[4] ISC contends that the limitations on Justice Department CIDs in Section 1312(c) of the Antitrust Civil Process Act, 15 U.S.C. §§1311 et seq., necessarily apply to CIDs issued under Section 21 of the FTC Act, 15 U.S.c. §57b-2. Pet. 3-8. Although Section 21 was modeled after the Antitrust Civil Process Act, Section 21 does not include language comparable to Section 1312(c), and there is no basis for reading its limitations into the FTC Act. Moreover, the two cases that ISC cites – *Australia/Eastern U.S.A. Shipping Conference, et. al. v. United States*, 1982-1 Trade Cas. Para. 64,721 (D.D.C. 1981) and *Aluminum Co. of America v. Department of Justice Antitrust Division*, 444 F. Supp. 1342 (D.D.C. 1978) – do not support its claim because both involved CIDs issued by the Justice Department, not the FTC.

[5] It may be that staff would discover that ISC's sales people are making representations contradicting the company's asserted policy, which would be relevant to the investigation.

In any event, ISC provides no legal support for quashing or limiting the specifications on burdensomeness grounds. As a matter of law, the staff is entitled to this information without restriction. *See SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056-57, (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) (vacating as an unnecessary encumbrance the requirement that SEC investigators furnish cautionary statements (e.g., that the agency had not reached any conclusions about respondents' alleged law violations and that respondents believed they were not subject to the securities law) prior to interviewing potential witnesses). Moreover, the Commission rejected a similar argument in *International Marketing Services*, file No. 862-3092 at 4-5 (March 28, 1988), where the petitioner claimed that the unrestricted contacts would jeopardize accounts receivable and lead to petitioner's bankruptcy. Finally, Judge Barnes' decision to initially impose restrictions in *Horizon* is not controlling. He did so in the exercise of his discretion and, in any event, ultimately permitted complaint counsel to contact the company's customers without restriction. *Horizon*, D.9017 C slip op. at 4 (March 7, 1978).

Accordingly, we deny petitioner's request to quash or limit CID specifications seeking witness names, addresses and telephone number.[6] In enforcing these specifications, a balance can be struck to avoid needless interference in the company's operations. Thus, while we deny petitioner's objection, we suggest that staff take care to avoid undue harm to the company's legitimate business interests.[7]

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[6] Thus, petitioner is required to comply with the following CID specifications: Spec. 1 of the DWI; Spec. 2(d) of the DWI; Spec 4 of DWI; and Spec. 5 of DWI. Other specifications requesting names and addressed shall be made available for inspection and copying in accordance with section II.B of this order.

[7] For example, staff could ask potential witnesses if they have ever had experience with the invention promotion industry rather than revealing that ISC is being investigated for deceptive practices. They could ask open-ended questions that avoid any direct allegations of illegal activities. However, we do not order the staff to utilize any specific language or mechanism.

We also reject the claim that the CIDs constitute an unwarranted intrusion into the privacy of certain individuals. *See, e.g.*, Pet. at 19. Personal privacy interests provide no basis for quashing a subpoena. *See FTC v. Shaffner*, 626 F.2d 32, 37-38 (7th Cir. 1980); *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 993 (D.C. Cir. 1975). Moreover, home addresses and telephone numbers will enable staff to communicate with employees away from their work placed, where they might be reluctant to speak freely. *See* Tr. at 96.

B. Production Would Require An Unreasonable Amount of Time and Expense

ISC also argues that the compliance with certain specifications, including several for which it has requested safeguards, would be unreasonably expensive, time consuming or impossible. Petitioner submits numerous affidavits from its president and employees detailing the estimated costs of compliance, the amount of time that will be spent searching and compiling the necessary information, the specific departments where responsive documents may be located and the potential disruption to company operations that may result. *See, e.g.*, Exhibits D, E, F, G, J, M, P, Q. These affidavits provide innumberable facts about the burden that will be imposed, including the number of hours that employees will spend retrieving and analyzing responsive materials and that approximate costs based on employee salaries. Based on the submitted affidavits, we estimate that compliance will cost over $385,000.

Staff provides no evidence to rebut the company's affidavits. Nor do they argue that the cost and time figures are inaccurate. Instead, staff claims that the estimated cost of compliance is minimal compared to the company's overall sales and to the costs upheld in other cases involving the FTC. Tr. at 93.[8]

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[8] In particular, staff cites *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977) (upholding costs of $4,000,000); *In re FTC Corporate Patterns Report Litigation*, 1977-2 Trade Cas. Para. 61,544 (D.D.C. 1977), *aff'd*, 595 F.2d 685, 704 (D.C. Cir.) *cert. denied*, 439 U.S. 958

A recipient of a Commission subpoena bears a heavy burden of proof in sustaining an objection that a subpoena is unduly burdensome. The applicable standard was stated in *FTC v. Texaco*, 555 F.2d at 882:

> We emphasize that the question is whether the demand is *unduly* burdensome or *unreasonably* broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where...the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. (footnotes omitted).

In our view, petitioner's detailed and unrebutted affidavits raise a legitimate question as to whether the burden of production would be unreasonable. We believe that the estimated costs of production -- $385,000 -- are indeed substantial given petitioner's size, especially where the Commission has not yet determined that there is sufficient reason to believe that ISC has violated any law that would warrant issuance of a complaint. On the other hand, we are reluctant to quash specifications seeking evidence that is necessary and relevant to the investigation.

Accordingly, with respect to certain specifications that we believe may impose an unnecessary burden upon ISC, we order petitioner to simply make the files available to Commission staff

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(1978) ($700,000 not undue given the size of corporation); *FTC v. Dresser Industries, Inc.*, 1977-1 Trade Cas. Para. 61,400 (D.D.C. 1977) ($400,000 burden of compliance not unreasonable).

for inspection and duplication.[9] ISC need not analyze, extract and copy the responsive documents. After reviewing the materials, staff may select the relevant materials at petitioner's offices and either duplicate them on the premises or remove them for duplication in which event they shall be returned to ISC within one week. As counsel, this method of compliance will alleviate the ISC's burden (Tr. at 45), while providing FTC staff with necessary evidence for the investigation.

We have also narrowed the scope of several specifications. We order production with the following specifications because as limited the burden would not be undue.

Spec. 21 of DWI, which requests for each document submitted, the date prepared, name and position of the person from whose file it was produced and identity of author. We believe that ISC has raised a legitimate question as to whether this specification imposes an undue burden. Tr. at 60. We therefore order production only with respect to documents that ISC produces in accordance with this order, but not those made available for inspection and copying. Naturally, staff may subsequently subpoena information responsive to this specification for any documents they obtain after inspection.

Spec. 22 of DWI, which seeks information about any documents that may have been lost or destroyed. ISC attests that due to staff changes, it is impossible to reconstruct all of its previous documents, and that to do so would require polling present staff persons department by department. Pet. Par. 12. Exhibit J-1. *See also* Tr. at 61-62. Accordingly, we modify this specification as follows:

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[9] ISC shall make available files responsive to the following specifications: Spec. 6 of the DWI; Specs. 10 and 12 of DWI; Spec. 18 of DWI; Spec. 5 of DDM; Spec. 7 of DDM; Spec. 10 of DDM; Spec. 11 of DDM; and Spec. 12 (a) and (c) of DDM.

> if you have specific knowledge of any document requested in the CID for Documentary Material that is unavailable because of loss or destruction, other than loss or destruction in the ordinary course of business, identify such document(s) to the fullest extent possible and state the date and circumstances of the destruction or loss.

Specs. 8 and 9 of DDM, which request all oral or written consumer complaints, including handwritten notes relating thereto and ISC responses, and documents reflecting complaints from government agencies or the BBB. We order production of all responsive documents not contained in the client files.[10] However, we narrow Specification 8 to encompass documents reflecting written and oral complaints in which the customer requested a refund. With respect to Specification 9, we reject as unsupported the argument that the specification is overbroad. Pet Par 20. *See also* Tr. at 72.

Spec. 4 of DDM, which requests documents provided to or prepared by sales staff concerning marketing startegies and sales techniques. ISC maintains that it has supplied all documents that are *currently* in effect. Requiring further production would be virtually impossible. Pet. Par. 15. Exhibit K. We limit this specification to any documents, including outdated or unauthorized documents, that ISC or its employees are currently aware of.

Spec. 6 of DDM, seeking documents shown to clients and potential clients, such as promotional materials, contracts, and disclaimers. ISC claims to have supplied all authorized documents, including outdated documents, that ISC has reason to believe were furnished to clients whether or not the company authorized the furnishing of such documents.

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[10] Complaints contained in client files would be available for inspection and copying in accordance with part II.B of this order.

Accordingly, we order ISC to comply with the challenged specifications in accordance with the above discussion.

C. Confidentiality

Petitioner claims that certain confidentiality agreements protect information about its clients and customer inventions.[11] The company also claims that a lawsuit concerning ISC is sealed, and that a particular settlement agreement is subject to confidentiality agreements between the parties.[12] ISC asserts that requiring the company to violate these confidentiality requirements would be unduly burdensome and oppressive. *See* Pet. Pars. 10, 14, 18, 22.

However, the fact that subpoenaed material may be subject to alleged confidentiality agreements provides no basis for quashing a CID. *See FTC v. Tuttle*, 244 F.2d 605, 607 (2d Cir.), *cert. denied*, 354 u.S. 925 (1957) (enforcing a subpoena for data provided under confidentiality agreements.) ISC's argument is contrary to the well-established principle that the materials's asserted confidentiality does not warrant quashing a CID. *See FTC v. Tuttle*, 244 F.2d at 616. Production, however, will in no way compromise confidentiality inasmuch as Section 21(b) of the FTC Act, 15 U.S.C. §57b-2(b), expressly prohibits the public disclosure of information obtained by compulsory process in a law enforcement investigation. *See also* Commission Rule 4.10(a)(9), 16 C.F.R. §4.10(a)(9) (1989). Further, under Section 21(b)(3)(C) of the FTC Act, subpoenaed material must be kept confidential and will not be publicly released without the consent of the submitting party. 15 U.S.C. §57b-2(b)(3)(C).[13] Moreover, Section 10 if the

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[11] *See* Spec. 19 of DWI; and Specs. 7 and 11 of DDM.

[12] Spec. 3 of DDM.

[13] Section 21(d)(1)(C) of the FTC Act, 15 U.S.C. §57b-2(d)(1)(C), allows disclosure of subpoenaed materials in adjudicative or court proceedings without a party's consent. Such disclosure, however, is to be governed by court or Commission rules under 15 U.S.C. §57b-2(d)(2), which allows a party to seek a protective order under appropriate circumstances. *See also* Commission Rule 4.10(g), 16 C.F.R. §4.10(g) (1989).

FTC Act, 15 U.S.C. §50, provides criminal fines and penalties for violations of these provisions.

Accordingly, confidentiality requirements provide no basis for quashing the relevant subpoena specifications.[14]

D. Relevance

ISC correctly recognizes that relevance is measured against the general scope and purpose of the investigation as set forth in the resolution authorizing the compulsory process. *See FTC v. Texaco*, 555 F.2d at 874. Pet. at 9. It advances two arguments in contending that certain specifications fail to meet this standard. First, ISC claims that the investigation is limited to determining whether ISC has engaged in deceptive advertising. ISC argues that information about prices clients have paid, ideas ISC has rejected, remuneration consumers have received and pending lawsuits is not reasonably relevant to deceptive advertising.[15] Pet. Pars. 608 and 14.

However, ISC reads the scope of the investigation too narrowly. The investigation seeks to determine whether ISC or its employees have engaged in *any* unfair or deceptive acts, *including but not limited* to deceptive advertising (emphasis added).[16] A

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[14] At the oral argument, staff conceded that information filed under a court seal would not be subject to production. Tr. at 92. We note, however, that ISC has failed to produce any affidavits or court records to demonstrate that any responsive documents are subject to a court protective order. Accordingly, we order ISC to comply with Spec. 3 of DDM unless, of course, petitioner produces such an order to the Commission.

[15] *See* Specs. 10, 12, 13 and 14 of DWI; and Spec. 3 of DDM.

[16] The resolution plainly states the nature and scope of the investigation as follows:

> To determine whether [ISC], Martin Berger, and others may be engaged in unfair or deceptive acts or practices...in violation of Section 5...including but not limited to false or misleading representations made in connection with the advertising, offereing for sale and sale of its services relating

correct interpretation is whether ISC or its employees have engaged in any deceptive activities in connection with the promotion of inventions or ideas. Thus, information about prices paid for ISC's services may, for example, shed light on whether ISC charges different clients different fees in order to retain a client, providing discounts for "marketable" inventions. Moreover, information about rejected ideas and remuneration received may help dtermine whether salespersons' enthusiasm for a particular invention was deceptive. Although ISC says that its official poilcy is not to promise remuneration, the investigation may reveal that it tolerates or even encourages oral promises of profits, thus making evidence bearing on the veracity of such promises relevant. *See, e.g.*, Tr. at 80, 87 (complaints suggest that salespeople are making oral misrepresentaions that override official disclaimers). Finally, lawsuits filed against ISC may reveal whether there are other similar claims against the company. Tr. at 92.[17]

In any event, the Commission need not delineate a particular theory of violation in the pre-complaint stage of an investigation in order to demonstrate relevance. *FTC v. Texaco*, 444 F.2d at 874. Where a likelihood exists that production may lead to relevant evidence -- even if not information that was expressly contemplated -- a specification should not be quashed. *Cf. United States v. Morton Salt Co.*, 338 U.S. 632, 641-43 (1950) (concept of relevance broader in agency investigations than in federal court discovery). *See also FTC v. Texaco*, 555 F.2d at 877, where the court observed that:

> to the promotion of inventions or ideas...[and] to determine whether Commission action to obtain redress of injury to consumers and others would be in the public interest.

[17] We also reject the claim advanced during the oral hearing the Spec. 19 of DWI (inventions exhibited at trade shows) is irrelevant because official policy is not to exhibit client inventions. Tr. at 56-58. For the reasons stated above, we believe staff is entitled to this information.

> While the FTC has not articulated the specific [unlawful] practices which may be present, it could not reasonably do so without access to the relevant documents. Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance. (footnotes omitted).

Second, ISC cites *FTC v. Turner*, 609 F.2d 743 (5th Cir. 1980) in arguing that the Commission may not seek financial information to determine if an action for civil redress is appropriate. Pet. Pars. 13, 23.[18] In *Turner*, the court held that inquiry into a company's financial condition, for the purpose of determining the practical feasibility of a redress action, is not relevant to an investigation of deceptive practices. The Commission upheld a similar objection in *Rome Finance Company, Inc.*, File No. 862-3090 (March 25, 1988). ISC cites to the resolution in claiming that the "only possible reason" for requiring financial information is "to determine the practical feasibility of instituting a damage action." Pet. at 39.

However, staff asserts that ISC has already provided sufficient information about gross revenues to support a damage action. Tr. at 79. Instead, staff seeks the financial data to establish liability, not for redress purposes. *Id.* In particular, according to staff, the financial information may reveal the extent to which profits can be realized from the alleged misrepresentations. Tr. at 79.

Accordingly, we believe that *FTC v. Turner* is distinguishable. The financial information is being sought, not to determine the feasibility of a redress action, but as evidence of a possible profit motive for the alleged misrepresentations, which bears on ISC's culpability for them. We therefore conclude that specifications

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[18] *See* Specs. 1 and 2 of DDM (balance sheets, income statements and gross sales); and Spec. 12(b) of DDM (financial status of regional sales offices).

seeking financial data are reasonably relevant to the investigation and shall be sustained.

III. Conclusion

For the foregoing reasons, ISC's Petition to Quash or Limit CIDs is granted in part and denied in part. ISC's specific obligations with respect to the challenged specifications are summarized in the appendix attached to this order. ISC is directed to comply with these specifications on or before October 16, 1989.

Pursuant to Commission Rule 2.7(f), 16 C.F.R. §2.7(f) (1989), within three days after service of this ruling, the petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 C.F.R. 4.4(b) (1989). the timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

By direction of the Commission.

Donald S. Clark

Secretary

APPENDIX

ISC's Obligations with Respect
to Challenged Specifications

Demand For Written Interrogatories

Spec. 1	- production
Spec. 2(d)	- production
Spec. 4	- production
Spec. 5	- production
Spec. 6	- make available for inspection and copying
Spec. 10 & 12	- make available for inspection and copying
Spec. 13	- production
Spec. 14	- production
Spec. 18	- make available for inspection and copying
Spec. 21	- production, but only for documents being produced in accordance with this order
Spec. 22	- identify to the fullest extent possible, by providing date and circumstances of destruction or loss, any documents requested by the CID for Documentary Material which you know are unavailable because of loss or destruction, other than loss or destruction in the ordinary course of business.

Demand For Documentary Material

Specs. 1 & 2	- production
Spec. 3	- production
Spec. 4	- produce all documents, including unauthorized and outdated documents, that ISC is aware of
Spec. 5	- make available for copying and inspection
Spec. 6	- produce all documents, including outdated, documents that ISC has reason to believe were furnished to clients whether or not it authorized the furnishing of such documents
Spec. 7	- available for copying and inspection

Spec. 8	- produce all oral and written complaints in which the customer requested a refund not contained in client files
Spec. 9	- production
Spec. 10	- make available for inspection and copying
Spec. 11	- make available for inspection and copying
Spec. 12(b)	- production
Spec. 12(a)	- make available for inspection and copying
Spec. 12(c)	- make available for inspection and copying

FEDERAL TRADE COMMISSION
Washington D.C. 20580

Office of the Secretary

Edward B. Friedman, Esquire
Friedman & Friedman
900 Fifth Avenue
Pittsburgh, PA 15219

Re: Invention Submission Corporation
File No. 882-3060

Dear Mr. Friedman:

The Commission has considered: (a) the Petition to Limit or Quash CIDs and supporting materials that you filed on behalf of Invention Submission Corporation; (b) the September 25, 1989 letter ruling partially granting and denying the Petition; (c) the Petition for Full Commission Review filed on October 2, 1989; and (d) the CIDs in issue.

The Commission has determined that your Petition for Full Commission Review does not raise any new issues regarding the requested quashing or limiting of the CIDs, and that the Petition to Limit or Quash CIDs was properly denied for the reasons stated in the September 25, 1989 ruling. The Commission also denies your request for an extension of the October 16, 1989 return date. Accordingly, the full Commission concurs with and hereby adopts the ruling in this matter.[1]

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[1] The Appendix to the Commission's September 25, 1989 ruling inadvertently omitted Specification 19, of the Demand for Written Interrogatories. In accordance with sections II.A. and C. of the ruling, ISC is directed to produce all documents responsive to Spec. 19, of the DWI.

For the foregoing reasons, the Petition for Full Commission Review is denied. Invention Submission Corporation is directed to comply with the Civil Investigative Demands by October 16, 1989.

By direction of the Commission, Commissioner Azcuenaga dissenting.

Donald S. Clark

Secretary

§ 45. **Unfair methods of competition unlawful; prevention by Commission**

(a) Declaration of unlawfulness; power to prohibit practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. §181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. §227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless-

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect-

(i) on commerce which is not commerce with foreign import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

§57b-1. Civil investigative demands

(a) Definitions

For the purposes of this section:

(1) The terms "civil investigative demand" and "demand" mean any demand issued by the Commission under subsection (c) (1) of this section.

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title).

(3) The term "Commission investigator" means any attorney or investigator employed by the Commission who is charged with the duty of enforcing or carrying into effect any provisions relating to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title).

(4) The term "custodian" means the custodian or any deputy custodian designated under section 57b-2(b)(2)(A) of this title.

(5) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(6) The term "person" means any natural person, partnership, corporation, association, or other legal

entity, including any person acting under color or authority of State law.

(7) The term "violation" means any act or omission constituting an unfair or deceptive act or practice in or affecting commerce (within the meaning of section 45(a)(1) of this title).

(b) Actions conducted by Commission respecting unfair or deceptive acts or practices in or affecting commerce

For the purpose of investigations performed pursuant to this section with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), all actions of the Commission taken under section 46 and section 49 of this title shall be conducted pursuant to subsection (c) of this section.

(c) Issuance of demand; contents; service; verified return; sworn certificates; answers; taking of oral testimony

(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), the Commission may, before the institution of any proceedings under sections 41 to 46 and 47 to 58 of this title, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

(2) Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under

investigation and the provision of law applicable to such violation.

(3) Each civil investigative demand for the production of documentary material shall-

(A) describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available.

(4) Each civil investigative demand for written reports or answers to questions shall-

(A) propound with definiteness and certainty the reports to be produced or the questions to be answered;

(B) prescribe a date or dates at which time written reports or answers to questions shall be submitted; and

(C) identify the custodian to whom such reports or answers shall be submitted.

(5) Each civil investigative demand for the giving of oral testimony shall-

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify a Commission investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted.

(6) (A) Any civil investigative demand may be served by any Commission investigator at any place within the territorial jurisdiction of any court of the United States.

(B) Any such demand or any enforcement petition filed under this section may be served upon any person who is not found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation.

(C) To the extent that the courts of the United States have authority to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such district court would have if such person were personally within the jurisdiction of such district court.

(7) Service of any civil investigative demand or any enforcement petition filed under this section may be made upon a partnership, corporation, association, or other legal entity by-

(A) delivering a duly executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of such partnership, corporation, association, or other legal entity, or to any agent of such partnership, corporation, association, or other legal entity authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or other legal entity;

(B) delivering a duly executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or other legal entity to be served; or

(C) depositing a duly executed copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or other legal entity at its principal office or place of business.

(8) Service of any civil investigative demand or of any enforcement petition filed under this section may be made upon any natural person by-

(A) delivering a duly executed copy of such demand or petition to the person to served; or

(B) depositing a duly executed copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person at his residence or principal office or place of business.

(9) A verified return by the individual serving any civil investigative demand or any enforcement petition filed under this section setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand or enforcement petition.

(10) The production of documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(11) Each reporting requirement or question in a civil investigative demand shall be answered separately and fully

in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, by any person responsible for answering each reporting requirement or question, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

(12) (A) Any Commission investigator before whom oral testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by any individual acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. After the testimony is fully transcribed, the Commission investigator before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(B) Any Commission investigator before whom oral testimony is to be taken shall exclude from the place where the testimony is to be taken all other persons except the person giving the testimony, his attorney, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(C) The oral testimony of any person taken pursuant to a civil investigative demand shall be taken in the judicial district of the United States in which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the Commission investigator before whom the oral testimony of such person is to be taken and such person.

(D) (i) Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney. The attorney may advise such person, in

confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

(ii) Such person or attorney may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not himself or through his attorney otherwise interrupt the oral examination. If such person refuses to answer any question, the Commission may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question.

(iii) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of Title 18.

(E) (i) After the testimony of any witness is fully transcribed, the Commission investigator shall afford the witness (who may be accompanied by an attorney) a reasonable opportunity to examine the transcript. The transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness, unless the

witness in writing waives the signing, is ill, cannot be found, or refuses to sign.

(ii) If the transcript is not signed by the witness during the 30-day period following the date upon which the witness is first afforded a reasonable opportunity to examine it, the Commission investigator shall sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign.

(F) The Commission investigator shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness, and the Commission investigator shall promptly deliver the transcript or send it by registered or certified mail to the custodian.

(G) The Commission investigator shall furnish a copy of the transcript (upon payment of reasonable charges for the transcript) to the witness only, except that the Commission may for good cause limit such witness to inspection of the official transcript of his testimony.

(H) Any witness appearing for the taking of oral testimony pursuant to a civil investigative demand shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

(d) Procedures for demand material

Materials received as a result of a civil investigative demand shall be subject to the procedures established in section 57b-2 of this title.

(e) Petition for enforcement

Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or

whenever satisfactory copying or reporduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such persons resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section. All process of any court to which application may be made as provided in this subsection may be served in any judicial district.

(f) Petition for order modifying or setting aside demand

(1) Not later than 20 days after the service of any civil investigative demand upon any person under subsection (c) of this section, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any Commission investigator named in the demand, such person may file with the Commission a petition for an order by the Commission modifying or setting aside the demand.

(2) The time permitted for compliance with the demand in whole or in part, as deemed proper and ordered by the Commission, shall not run during the pendency of such petition at the Commission, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of the demand to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of such person.

(g) Custodial control of documentary material, reports, etc.

At any time during which any custodian is in custody or control of any documentation material, reports, answers to

questions, or transcripts of oral testimony given by any person in compliance with any civil investigative demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section or section 57b-2 of this title.

(h) Jurisdiction of court

Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section. any final order so entered shall be subject to appeal pursuant to section 1291 of Title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of such court.

(i) Commission authority to issue subpoenas or make demand for information

Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information, under authority of sections 41 to 46 and 47 to 58 of this title or any other provision of law, unless such subpoena or demand for information is signed by a Commissioner acting pursuant to a Commission resolution. The Commission shall not delegate the power conferred by this section to sign subpoenas or demands for information to any other person.

(j) Applicability of this section

The provisions of this section shall not--

(1) apply to any proceeding under section 45(b) of this title; or

(2) apply to or affect the jurisdiction, duties, or powers of any agency of the Federal Government, other than the

Commission, regardless of whether such jurisdiction, duties, or powers are derived in whole or in part, by reference to sections 41 to 46 and 47 to 58 of this title.

16 C.F.R §2.1 **FEDERAL TRADE COMMISSION**

SUBPART A-INQUIRIES; INVESTIGATIONS; COMPULSORY PROCESSES

§2.1 How initiated

Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative. The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection, and the Regional Directors and Assistant Regional Directors of the Commission's regional offices, without power of redelegation, limited authority to initiate investigations.

§2.4 Investigational policy

The Commission encourages voluntary cooperation in its investigations. Where the public requires, however, the Commission may, in any matter under investigation adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law.

§2.5 By whom conducted

Inquiries and investigations are conducted under the various statutes administered by the Commission by Commission representatives designated and duly authorized for the purpose. Such representatives are "examiners" or "Commission investigators" within the meaning of the Federal Trade

Commission Act [15 U.S.C.A. §41 et seq.] and are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission. Included among such duties is the administration of oaths and affirmations in any matter under investigation by the Commission.

§2.6 Notification of purpose

Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation.

§2.7 Compulsory process in investigations

(a) In general.--The Commission or any member thereof may, pursuant to a Commission resolution, issue a subpoena or a civil investigative demand directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence, or both, or, in the case of a civil investigative demand, to provide a written report or answers to questions relating to any matter under investigation by the Commission. Material for which a civil investigative demand has been issued shall be made available for inspection and copying at the principal place of business of the person or at such other place or in such other manner as the person and the custodian designated pursuant to §2.16 agree.

(b) Civil Investigative Demands.--Civil investigative demands shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices within the meaning of FTC Act section 5(a)(1) [15 U.S.C.A. §45(a)(1).

(1) Civil investigative demands for the production of documentary material shall describe each class of material to be produced with such definiteness and certainty as to permit

such material to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the custodian to whom such material shall be made available. Production of documentary material in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(10) of the Federal Trade Commission Act [15 U.S.C.A. § 57b-1(c)(10)].

(2) Civil investigative demands for written reports or answers to questions shall propound with definiteness and certainty the reports to be produced or the questions to be answered, prescribe a date or dates at which time written reports or answers to questions shall be submitted, and identify the custodian to whom such reports or answers shall be submitted. Response to a civil investigative demand for a written report or answers to questions shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act [15 U.S.C.A. §57b-1(c)(11)].

(3) Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Commission investigator who shall conduct the investigation and the cutodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act [15 U.S.C.A. § 57b-1(c)(12)].

(c) The Bureau Director, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors, and Assistant Regional Directors, are authorized to negotiate and approve the terms of satisfactory compliance with subpoenas and civil

investigative demadns and, for good cause shown, may extend the time prescribed for compliance. Specifically, the subpoena power conferred by Section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) is included within this delegation.

(d) Petitions to limit or quash-(1) General. Any petition to limit or quash any investigational subpoena or civil investigative demand shall be filed with the Secretary of the Commission within twenty (20) days after service of the subpoena or civil investigative demand, or, if the return date is less than (20) days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation.

(2) Statement.--Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference.

(3) Extensions of time. Bureau Directors, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors in the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file such petitions.

(4) Disposition. A Commissioner, to be designated by the Chairman, is delegated, without power of redelegation, the authority to rule upon petitions to limit or quash an

investigational subpoena or civil investigative demand, but the designated Commissioner may, in his or her sole discretion, refer a petition to the full Commission for determination.

(e) Stay of compliance period. The timely filing of a petition to limit or quash any investigational subpoena or civil investigative demand shall stay the time permitted for compliance with the portion challenged. If the petition is denied in whole or in part, the ruling will specify a new return date.

(f) Review. Any petitioner, within three days after service of a ruling by the designated Commissioner denying all or a portion of the relief requested in its petition, may file with the Secretary of the Commission a request that the full Commission review the ruling. The timely filing of such a request shall not stay the return date specified in the ruling, unless otherwise specified by the Commission.

(g) Public disclosure. All petitions to limit or quash investigational subpoenas or civil investigative demands and the responses thereto are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of this chapter.

§2.8A. Withholding requested material

(a) Any person withholding material responsive to an investigational subpoena or civil investigative demand issued pursuant to §2.7, an access order issued pursuant to §2.11, an order to file a report issued pursuant to §2.12, or any other request for production of material issued under this Part, shall assert a claim of privilege or any similar claim not later than the date set for the production of material. Such person shall, if so directed in the subpoena, civil investigative demand or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients

of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material solely for reasons described in §2.9A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the Secretary

March 25, 1988

J. Alan Steele, Esquire
Custom House
555 Battery Street No. 2967
San Francisco, California 94126

Re: Petition to Quash Civil Investigative Demand
Rome Finance Company, Inc.

Dear Mr. Steele:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash and Limit Civil Investigative Demand (Petition), which you filed on behalf of your client, Rome Finance Company, Inc., ("Rome" or "petitioner") in the above matter.

The ruling set forth herein has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984). Pursuant to Rule 2.7(f), within three days after service of this decision, petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

The petition is denied for the reasons stated below, except that it is granted with respect to Document Request 8, and that; with respect to those items for which Rome and the Commission staff

have agreed on limitations to the CID, required compliance is limited to the response set out in the staff's letter of March 7, 1988.

I. Background

On October 8, 1987, the Commission issued a resolution authorizing the use of compulsory process in its nonpublic investigation of Rome and others. The resolution states that the purpose of the investigation is to determine whether Rome or others may have engaged in violations of law in connection with door-to-door sales of reference books, textbooks, study materials, and photographic products and services. The possible violations under investigation include unfair or deceptive acts or practices through misrepresentations regarding products and services sold, failure to disclose material facts in connection with the sale of products and services, and failure to make timely delivery as represented; failure to comply with the Commission's Trade Regulation Rule concerning a Cooling-Off Period for Door-to-Door Sales; and failure to comply with the Truth in Lending Act and regulations. The investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest. *See* Resolution, October 8, 1987. The CID was issued on January 5, 1988, and mailed on January 6, 1988. (it was originally issued December 23, 1987, but reissued two weeks later when it was discovered that the first one lacked a return date.) Petitioner was served on or about January 7, 1988.

On February 5, 1988, Rome filed its Petition to quash the CID. The Petition objects to certain parts of the CID as "an unwarranted fishing expedition," and objects to the "unreasonable time frame" for response. Most of its objections are set out in a January 20, 1988 memorandum attached to the Petition, which argues that certain aspects of the CID are unduly burdensome and requests that the CID be limited to the terms of an alleged agreement between the parties.

Commissioner Calvani has carefully reviewed the Petition and accompanying exhibits. He has also considered the oral presentation on the Petition conducted on March 8, 1988. Petitioner's objections to the CID are discussed below.

II. Specific Objections

A. Relevance

Rome contends that the request for financial information, Document Request 8, is premature and irrelevant. Rome argues that there has been no showing of liability, and hence there is no justification for imposing the burden of producing data relevant only to remedy. Rome claims its financial statements will not distinguish between profits from activities covered by the resolution and profits from other activities, so the financial information would be "misleading and useless." Further, Rome argues that, if there were violations of any law, they were by the actual sellers and not by Rome, which merely bought credit contracts. To convince it that there is any legal basis for making it undergo the "substantial burden" of the requested production, Rome wants the "documentation in support of the Resolution and other documents that would reveal the theory under which Rome would have any liability at all." Rome denies that the Commission may investigate its financial condition as a partial step to measuring the extent of consumer injury, arguing that it is up to the Commission first to demonstrate wrongdoing. Rome argues generally that, before it should be obligated to supply requested documents and information, the Commission is obligated to state the factual assertions and legal theories justifying its demands.

The Commission has done so, in the resolution that supports the CID. Rome is entitled to no further demonstration of the theories and evidence that may lead to a finding of liability at this time. However, Rome is correct that it is not obligated to respond to Document Request 8 at this time. In the case most clearly on point, it has been held that, in analogous but not identical circumstances, the Commission is like a private civil litigant and may discover information about a proposed respondent's assets

only after liability is established, the context of collecting a judgment, by analogy to Federal Rule of Civil Procedure 69(a). *F.T.C. v. Turner*, 609 F.2d 743 (5th. Cir. 1980).

Rome argues that Interrogatories 5(b) and 5(c) seek information that is irrelevant, asserting that Rome's credit offerings meet the appropriate regulatory standards. But one purpose of the investigation is to determine whether Rome's credit offerings meet the appropriate regulatory standards. These interrogatories will help determine whether the credit Rome offers is in fact open-end or closed-end. Rome cannot avoid responding merely be asserting that its credit offerings are open-end, a proposition that must be determined by investigation.

Rome contends that requests to cancel orders later than three days after sale and other documents related to such requests, called for by the Document Request 4, are not "germain [sic] to the scope of the resolution." Jan. 20, 1988 Mem. at 2. Rome is incorrect. The documents sought could contain evidence of violations described in the resolution, such as misrepresentations, failures to disclose, and failure to make timely delivery.

It is well established that an administrative subpoena that seeks information relevant to a lawful agency purpose will be enforced provided it is not unreasonably indefinite or burdensome. *FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977) *citing Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Further, as a general rule, substantive issues that may be raised in defense against an administrative complaint are premature when raised to prevent enforcement of an administrative subpoena. *FTC v. Texaco*, 555 F.2d at 879.

B. Burden

Rome argues that the CID is burdensome, but offers no demonstration of how the CID's requirements would impose any undue burden on it. In particular, it objects to two parts of Interrogatory 4 that require it to compile and submit six numbers:

the total amounts of contracts transferred to the company and the total amounts paid for those contracts, for three years. It alleges only that the requests are "overly burdensome and require a compilation that cannot be undertaken within the time for return as notices."

A recipient of a Commission subpoena or CID bears a heavy burden of proof to sustain an objection that it is unduly burdensome. The applicable standard was stated in *FTC v. Texaco*, 555 F.2d at 882:

> We emphasize that the question is whether the demand is *unduly* burdensome or *unreasonably* broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.

The Commission finds that petitioner has failed to meet this standard. Petitioner has provided no evidence, affidavits or testimony to support this objection other than conclusory statements. Accordingly, the CID will not be quashed on the grounds that imposes an undue burden.

III. Conclusion

Rome has negotiated with the Commission staff to limit the scope of the CID in certain respects. These limitations are described in a letter of March 7, 1988, from Maxine R. Stansell to J. Alan Steele. The CID is limited to require the response described in that letter, except with respect to Document Request 8, for which the petition is granted and the CID is quashed, and Interrogatories 4(a)(iii), 4(a)(iv), 5(b) and 5(c), for which the letter sets out no agreed limitation, and for which the Petition is denied

and rome is required to respond to the CID as issued. Rome is directed to comply with the CID as limited on or before April 25, 1988.

Pursuant to Rule 2.7(f), within three days after service of this ruling, the petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 C.F.R. 4.4(b) (1987). The timely request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

By direction of the Commission.

Benjamin I. Berman
Acting Secretary

Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

No. 92-777

In the Supreme Court of the United States

OCTOBER TERM, 1992

INVENTION SUBMISSION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that financial data requested from petitioner were relevant to the Federal Trade Commission's investigation of potentially deceptive practices.

2. Whether the district court abused its discretion by declining to issue a protective order restricting contacts between Commission investigators and witnesses identified through information supplied by petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-777

INVENTION SUBMISSION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-11a, is reported at 965 F.2d 1086. The district court's enforcement order, Pet. App. 1c-13c, is not officially reported, but is reprinted at 1991-1 Trade Cas. (CCH) ¶ 69,338.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1992. Pet. App. 1a. A petition for rehearing was denied on August 4, 1992. Pet. App. 1b. The petition for a writ of certiorari was filed on November 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is in the business of selling various services to help customers market their ideas and inventions. Petitioner offers to prepare brochures that describe customers' ideas or inventions; bring inventors' ideas to the attention of potential licensors or manufacturers; and maintain a "Data Bank" of businesses interested in new inventions. Pet. App. 1c. After receiving numerous consumer complaints, the Boston Regional Office of the Federal Trade Commission began an investigation to determine whether petitioner might be violating Section 5(a) of the Federal Trade Commission Act (the FTC Act), 15 U.S.C. 45(a), by soliciting customers through unfair or deceptive methods (such as misrepresenting the potential profitability of particular ideas or inventions).[1] Pet. App. 9a-10a, 4d, 12d.

Commission attorneys first asked petitioner to supply information concerning its business voluntarily. Petitioner refused, however, to provide certain information relating to its finances, sales staff, and customers. Pet. App. 2c. In December 1988, the Commission issued a resolution authorizing the use of compulsory process in the investigation.[2] *Ibid.* In

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[1] Petitioner complains that the Commission has been investigating it for more than four years. Pet. 6. As discussed below, during most of that period Commission attorneys were endeavoring to obtain essential information from petitioner.

[2] The resolution (quoted at Pet. App. 2a) defined the scope of the investigation:

> To determine whether Invention Submission Corporation, Martin Berger, and others may be engaged in unfair or deceptive acts or practices, * * * in violation of Section 5 of the Federal Trade Commission Act, * * * including but

May 1989, the Commission issued two administrative subpoenas, known as "civil investigative demands" (CIDs), pursuant to Section 20 of the FTC Act, 15 U.S.C. 57b-1. Pet. App. 2c. The CIDs requested information concerning, *inter alia*, petitioner's organization, income, sales procedures, advertising and services, and identification of petitioner's customers and employees and the companies in its Data Bank. *Id.* at 3d, 9d, 13d.

Petitioner asked the Commission to quash the CIDs as to most of the information demanded. See Pet. App. 1d-16d. Among other objections, petitioner argued that the financial information sought was irrelevant because it was allegedly sought solely in order to determine whether petitioner had enough assets to make an action for consumer redress worthwhile, a purpose held impermissible in *FTC* v. *Turner*, 609 F.2d 743 (5th Cir. 1980). See Pet. App. 13d. Petitioner also claimed that providing information concerning potential witnesses "without any safeguards on the use of the information" would be "unduly burdensome and oppressive." *Id.* at 3d.

Petitioner's request was assigned to then-Commissioner Terry Calvani under Commission Rule 2.7(d), 16 C.F.R. 2.7(d), which permits a single Commissioner to rule on petitions to quash. In September 1989, Commissioner Calvani modified the CIDs to reduce compliance costs, but rejected most of peti-

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not limited to false or misleading representations made in connection with the advertising, offering for sale and sale of its services relating to the promotion of inventions or ideas. The investigation is also designed to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

tioner's objections. Pet. App. 3a, 1d-16d. In particular, he rejected petitioner's relevance objection because the financial information was sought not to assess the feasibility of a redress action, but to establish petitioner's culpability for deceptive practices. *Id.* at 13d. As to "safeguards" restricting contacts with potential witnesses, he suggested several procedures that staff might follow, including asking customers about their experiences with idea promotion companies generally or asking open-ended questions that did not allege specific illegal activities, but he refused to impose any particular restrictions. *Id.* at 4d-5d & n.7.

Petitioner asked the full Commission to review Commissioner Calvani's decision. The Commission denied review in October 1989. Pet. App. 17d.

2. Petitioner continued to refuse to comply with most of the CID specifications, and in December 1989 the Commission filed a petition asking the district court to enforce the CIDs. Pet. App. 3a. Petitioner renewed its relevance objection and its demand for unspecified "safeguards" on Commission interviews with potential witnesses to avoid harm to petitioner's business. Among other arguments, the Commission pointed out to the court that petitioner's predictions of injury and requests for "safeguards" were particularly unwarranted in light of a Commission attorney's assurances—reiterated in declarations filed with the court under penalties of perjury—that Commission staff would inform persons they contacted that their interviews were part of an investigation of the invention promotion industry generally, without identifying petitioner as a particular target. The Commission also stated that its staff did not intend to contact most of petitioner's customers or

Data Bank companies, and had no present intention of contacting any of petitioner's advertising media. *Id.* at 7c-8c & nn.24, 25.

In February 1991 the district court entered an order enforcing the CIDs in full. Pet. App. 14c. The court found that the contested specifications (in-cluding those seeking financial information) were relevant and not unduly burdensome. *Id.* at 3c-7c. The court rejected petitioner's request to limit or impose conditions on the Commission's contacts with witnesses, concluding that accommodating petitioner's "highly speculative fears" would virtually nullify the Commission's investigatory powers. It also concluded that in light of the assurances offered by the Commission and its investigative staff regarding the conduct of the investigation, petitioner's "apprehensions [were] unfounded and insufficient to overcome the FTC's presumptive right to access to individuals and records." *Id.* at 7c-8c & nn. 24, 25. Petitioner was ordered to comply with the CIDs within 20 days. *Id.* at 14c.

3. Petitioner moved to stay compliance and to modify the court's order so as to require the Commission's attorneys to adhere to the assurances they had given regarding their contacts with witnesses. The Commission opposed the motion. After negotiations, a Commission attorney sent a letter to petitioner's counsel reiterating those assurances. See Pet. App. 4a; C.A. App. 121-124. In return, petitioner agreed to a production schedule, and the parties stipulated to denial of the motion to stay and modify the enforcement order. See Pet. App. 4a.

4. Petitioner appealed the enforcement order. The court of appeals affirmed the district court's order in

its entirety. Pet. App. 1a-11a. Following, *inter alia*, this Court's holding in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950), the court of appeals upheld the district court's finding that the requested information was "reasonably relevant" to the Commission's investigation. Pet. App. 4a-7a. It also affirmed the district court's refusal to impose limitations on Commission investigators' contacts with potential witnesses. It noted that petitioner's claim that communications with customers would place petitioner "under a cloud of suspicion," leading to business losses, "could be made with respect to almost any investigation." *Id.* at 8a. As to the Commission's assurances with respect to conduct of the investigation, the court first noted that it was "by no means obvious that [any] representations were required." *Ibid.* In any event, the court held that in light of the long-standing presumption of administrative regularity, the district court did not abuse its discretion by failing to "freeze" the Commission's assurances into a court order. *Id.* at 8a-9a.

ARGUMENT

1. Petitioner contends that the requested financial information was irrelevant to the Commission's investigation, and that the court of appeals impermissibly shifted to petitioner the burden of proving that the information requested was irrelevant. Pet. 18-23. Neither contention merits further review.

a. In issuing CIDs to petitioner, the Commission was investigating whether petitioner might be using illegal deceptive practices. This Court has said that when investigating potential violations of the law, the Commission is:

> analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

United States v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Accordingly, this Court and the lower courts have consistently recognized that a broad definition of relevance applies to compulsory process issued in investigations by the Commission and other administrative agencies. Information sought need only be "reasonably relevant" or "not plainly incompetent or irrelevant" to an inquiry that is within the Commission's authority. *Id.* at 652; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943). Accord, *e.g.*, *Sandsend Fin. Consultants, Ltd.* v. *Federal Home Loan Bank Bd.*, 878 F.2d 875, 878-879, 882 (5th Cir. 1989); *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 872-874 & n.23 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977).

Furthermore, where, as here, an agency is only investigating possible violations and has not yet formulated specific charges, the agency "can hardly be expected to know whether [requested] data will in fact be relevant until they are procured and scrutinized." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814 (1984). Accord, *e.g.*, *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 188, 194 (1990) (rejecting argument that agency must demonstrate a "particularized necessity of access, beyond a showing of mere relevance"); *United States* v. *First City Nat'l Bank*, 598 F.2d 594, 599 (Temp. Emer. Ct. App. 1979) (agency need not show a specific need for the subpoenaed information); *FTC* v. *Texaco, Inc.*, 555

F.2d at 877 (agency not required to "delineat[e] * * * a particular theory of violation" or offer specific examples of how responsive documents might relate to potential alleged violations). Indeed, this Court has indicated that any materials that may "cast light on" matters under investigation are relevant in the administrative subpoena context. *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68-69 (1984); *United States* v. *Arthur Young & Co.*, 465 U.S. at 814-815.

The three CID specifications at issue sought petitioner's balance sheets, income statements, and gross annual sales volumes, and books of account showing the financial status of each of petitioner's regional offices. See Pet. App. 13d n.18. There are a number of ways in which such information is relevant to the Commission's investigation. First, as Commissioner Calvani stated in denying petitioner's request to quash the CIDs, such information "may reveal the extent to which profits can be realized from the alleged misrepresentations," which may in turn bear on petitioner's culpability.[3] Pet. App. 13d. Financial information could, for example, reveal whether higher profits in some of petitioner's regional sales offices gave petitioner an incentive to

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[3] The primary focus of the investigation is on whether petitioner's salespersons have made oral promises (of profitability and the like) that override the representations and disclaimers in its written promotional materials and contracts. See Pet. App. 9a-10a, 12d. If such conduct led to high profits, petitioner would have had an obvious motive to ignore it, thus undermining any potential argument that petitioner should not be held responsible for allegedly "unauthorized" misrepresentations.

ignore any misrepresentations allegedly made by those offices. Gov't C.A. Br. 17, 19.

Financial statements showing breakdowns of petitioner's expenses also could reveal whether petitioner actually devoted much of its clients' payments to providing them with the services petitioner promised.[4] Gov't C.A. Br. 19. In addition, petitioner's gross annual sales could suggest the extent of potential consumer injury, which would be relevant to determining whether any violations were material. Gov't C.A. Br. 19-20; cf. *Invention Submission Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 23,068, at 22,746-22,747 & n.12 (F.T.C. 1991). And as the court of appeals remarked, profit comparisons among offices or between petitioner and similar companies could "help the Commission to allocate its limited investigative resources to protect the largest number of consumers from potential harm." Pet. App. 7a. Thus, the court of appeals correctly sustained the district court's finding that the requested financial informa-

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[4] This rationale was expressed in Commissioner Deborah Owen's ruling on petitioner's request to quash supplemental CIDs issued in 1991 (which are not at issue here). Gov't C.A. Br. 19 n.28; *Invention Submission Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 23,068, at 22,746 (F.T.C. 1991). The usefulness of financial breakdowns for this purpose was illustrated in *FTC* v. *Dupont Model Management, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,694, at 67,156-67,157 (E.D. Pa. 1992), where evidence showing that most of the defendants' income came from selling portfolio photographs to would-be models (rather than from commissions on fees paid to the models by employers) was cited as one indication that defendants were not offering a legitimate modeling service.

tion was reasonably relevant to the Commission's investigation.[5]

b. Petitioner contends that establishing a profit motive for deceptive practices was "the Commission's only rationale" for showing relevance. Pet. 19. Citing the court of appeals' comment that "profitability in and of itself does not suggest wrongdoing," Pet. App. 7a, petitioner then argues that the court "in effect rejected the Commission's only rationale for relevancy of the subpoenaed information." Pet. 19. But the Commission never equated profitability alone with deceptive business practices; it merely suggested that "lucrative returns may evidence a motive for encouraging or tolerating misrepresentations." Gov't C.A. Br. 19. And, as explained above, it suggested not one but several ways in which the information sought might prove relevant to its investigation. Although the court of appeals termed Commissioner Calvani's brief explanation of relevance "puzzling,"[6] Pet. App. 7a, it

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[5] Other courts have expressly found corporate financial information relevant to investigations of deceptive practices. See *FTC* v. *American Buyers Network, Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,551, at 66,443 (D. Colo. 1991) (financial information relevant to show interrelationships between respondent and affiliated companies, and to confirm other information); *FTC* v. *International Diamond Corp.*, No. C-81-29 MISC SAW (N.D. Cal. Jan. 4, 1982), slip op. 6 (cost and profit information relevant to investigation of allegedly deceptive diamond sales). Cf. *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1055 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974) (financial statements relevant to alleged violations of securities laws).

[6] The Commissioner's explanation was understandably brief because the principal issue before him was not how financial information would be relevant to showing liability, but whether

correctly relied on the several "different ways" in which the information might be relevant in upholding the district court's determination. See *id.* at 6a-7a.

Petitioner concedes that relevance "must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution [authorizing compulsory process]." Pet. 21, quoting *FTC* v. *Texaco, Inc.*, 555 F.2d at 874. As the court of appeals correctly noted, Pet. App. 5a, a district court in a subpoena enforcement action is not reviewing the agency's "internal determination of relevance," but making its own determination. Thus the court may "inquire into all relevant matters, unlimited by the scope of the agency's own inquiry, if any." *Ibid.*, quoting *United States* v. *Exxon Corp.*, 628 F.2d 70, 77 (D.C. Cir.), cert. denied, 446 U.S. 964 (1980). Accordingly, it was not erroneous, as petitioner apparently contends (Pet. 21), for the court of appeals to affirm enforcement of the CIDs based on the Commission's views as explicated in its briefs below, or even on the court's own views of relevance. See Pet. App. 7a.

c. Petitioner also claims, Pet. 19-23, that the court of appeals effectively relieved the Commission of the burden of showing relevance, and instead required petitioner to prove that the requested information was irrelevant to the Commission's investigation. This argument is based primarily on the court's statement that "in light of the broad deference we

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the information was sought for that purpose or, as petitioner argued, in order to determine whether petitioner had sufficient assets to make an action for consumer redress worthwhile. Pet. App. 13d-14d.

afford the investigating agency, it is essentially the respondent's burden to show that the information is irrelevant." Pet. 19, quoting Pet. App. 7a (emphasis omitted). The court made that statement, however, only after it had considered the Commission's rationales for requesting petitioner's financial information and concluded that the information was relevant. See Pet. App. 6a-7a. Read in context, the court's comment merely recognizes that under the overwhelming weight of authority, an agency's burden of establishing relevance is met so easily that the burden rapidly shifts to the recipient of compulsory process to rebut the agency's showing.[7] Indeed, this Court has made a similar observation. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) (relevance requirement "is not especially constraining" because the courts have "generously construed the term 'relevant' and have afforded the [EEOC] access to virtually any material that might cast light on the allegations against the employer").

2. a. Petitioner contends, Pet. 23-24, that the decision below conflicts with that in *FTC* v. *Turner*, 609 F.2d 743 (5th Cir. 1980). *Turner* involved an administrative subpoena issued by the Commission *after* it had investigated Turner and his company, held an administrative trial, and found them liable for engaging in deceptive practices. The subpoena sought financial information about Turner and his family solely to determine whether they had sufficient assets to warrant a separate action for

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[7] Moreover, as the appellant, petitioner bore the burden of showing that the district court's finding of relevance was clearly erroneous.

consumer redress under Section 19(a)(2) of the FTC Act, 15 U.S.C. 57b(a)(2). See 609 F.2d at 744. A sharply divided panel of the Fifth Circuit held that *in a redress action* the Commission's position is analogous to that of private litigants, who normally may not obtain information about a defendant's assets in pre-trial discovery. *Id.* at 745.[8] The majority therefore held that the Commission lacked "investigative authority"—the predicate for compulsory process—to obtain financial information about Turner "for the purpose of determining the practical feasibility of instituting a [redress] action."[9] *Id.* at 745-746.

Petitioner's contention that *Turner* "held that the financial information sought by the Commission was not relevant to the question of whether the law was violated," Pet. 23, misreads the court's opinion. The argument is based on a single sentence in the opinion: "The amount of Turner's assets is not relevant to an inquiry into whether a violation of the law exists." 609 F.2d at 745. See Pet. App. 5a. That sen-

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[8] Judge Brown dissented on the ground, *inter alia*, that the Commission's redress actions serve public law enforcement purposes, making analogies to private litigants inappropriate. 609 F.2d at 746-754. The Commission later issued a detailed ruling rejecting the *Turner* majority's opinion, relying in part on this Court's later observation in *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980), that "[w]hen the [agency] acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest." See *American Aqua Systems, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,750, at 22,475-22,478 (F.T.C. 1989).

[9] Petitioner concedes in this Court that the Commission does not seek petitioner's financial information for purposes of determining the feasibility of redress. Pet. 23 n.8.

tence, however, follows the court's general discussion of the Commission's "authority to conduct investigations to determine whether the law is being violated," and its assertion that the FTC's position in Turner's case "fail[ed] to distinguish investigations seeking information concerning wrongs done consumers from investigations into the practicality of pursuing a remedy for those wrongs." 609 F.2d at 745. In context, the immediately following comment, on which petitioners rely, merely expresses the Court's conclusion that Turner's case involved the latter sort of investigation—in which, as the opinion goes on to elaborate, *id.* at 745-746, the majority thought the Commission's subpoena power unusually circumscribed.

In *Turner*, the Commission had already determined in a final order that Turner had violated the law, and it sought financial information for the sole purpose of deciding whether to pursue consumer redress. See 609 F.2d at 746 n.1 (quoting Commission's resolution authorizing compulsory process). Because that was the only issue before the Fifth Circuit, that court hardly considered, as petitioner asserts, Pet. 24, "all possible bases" for enforcing a subpoena. Indeed, the court quite clearly did *not* consider any basis for enforcement based on an investigation, such as that in this case, "seeking information concerning wrongs done consumers."[10] In any event, it is clear that

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[10] Moreover, the *Turner* subpoena sought personal financial information from the defendant and his family, 609 F.2d at 744, raising personal privacy concerns but likely to reveal little about any deceptive business practices. Here, in contrast, the Commission seeks corporate balance sheets and sales figures germane to the conduct of petitioner's business. These

Turner's facts did not involve the normal investigatory context. Even read as petitioner suggests, therefore, the court's statement would be, as the court below remarked, "mere dictum for which the *Turner* court provided no explanation." Pet. App. 6a. Thus, regardless of whether *Turner* was correctly decided, there is no conflict between it and the decision in this case.

b. Petitioner contends further, Pet. 24, that the Commission previously construed *Turner* as "precluding discovery of financial information by the Commission * * * at any time prior to entry of a judgment." Petitioner relies on Commissioner Calvani's ruling on a petition to quash a CID issued to Rome Finance Company. Pet. App. 1f-6f. Whether or not petitioner reads that ruling correctly,[11] it is of little relevance. First, as noted above, the full Commission later considered both *Turner* and *Rome Finance*—which it, unlike petitioner, viewed as involving only the *Turner* issue of information sought "to determine the feasibility of an action for

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differences alone make *Turner* inapposite. Cf. *Morton Salt*, 338 U.S. at 652 ("corporations can claim no equality with individuals in the enjoyment of a right to privacy").

[11] Although it is not entirely clear from the text of the Rome Finance ruling, it appears that the CID at issue sought financial (as opposed to other) information only for purposes similar to those advanced in *Turner*. The ruling is silent about whether financial information might be relevant to investigating whether deceptive practices have occurred. See Pet. App. 3f-4f. It certainly did not, as petitioner's broad characterization suggests, state that financial information would be irrelevant to *any* Commission investigation. The relevance of corporate financial information to some investigations, such as proposed mergers, is of course beyond question.

consumer redress"—and explicitly rejected the *Turner* majority's conclusions. *American Aqua Systems, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,750, at 22,475-22,478 (F.T.C. 1989); see note 8, *supra*. Second, any inconsistency between the Commission's position here and that of a single Commissioner in a prior administrative ruling would, in any event, neither control a lower court's independent determination of relevance in a later case, Pet. App. 7a n.2, nor justify review of that determination by this Court.

3. Finally, petitioner argues, Pet. 25-28, that the district court erred by not explicitly ordering the Commission's staff to adhere to the assurances given to petitioners and to the district court regarding contacts with potential witnesses. Petitioner contends that the "presumption of administrative regularity and good faith," Pet. App. 8a, which the court of appeals invoked in upholding the district court's exercise of its discretion, is either non-existent or inapplicable here, Pet. 27-28, and complains that the CID is unduly burdensome because the court's order permits the Commission "unlimited contacts" with potential witnesses. Pet. 25. Aside from unjustifiably impugning the good faith of the Commission's staff, petitioner's arguments wholly fail to show that the Commission or the courts below abused their discretion.

The court of appeals was clearly correct that administrative agencies are generally entitled to a presumption of regularity—that is, an assumption that an agency and its staff will act responsibly. See, *e.g.*, *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926). Imposition of judicial protective orders

governing agencies' use of subpoenaed information is therefore ordinarily unnecessary and inappropriate. See, *e.g.*, *FCC* v. *Schreiber*, 381 U.S. at 295-298; *FTC* v. *Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980); *FTC* v. *Anderson*, 442 F. Supp. 1118, 1123-1126 (D.D.C. 1977), aff'd in part and remanded in part, 631 F.2d 741 (D.C. Cir. 1979). Petitioner's suggestion that the presumption does not apply to assurances given by the Commission's staff, Pet. 26 & n.9, 28, was effectively rejected in *Exxon Corp.* v. *FTC*, 665 F.2d 1274, 1279-1280 & n.7 (D.C. Cir. 1981), in which the court of appeals held that it was inappropriate to issue a judicial protective order to assure that the Commission's staff would not improperly disclose subpoenaed documents. Indeed, petitioner's apparent suggestion that Commission staff would lightly disregard representations made under penalties of perjury in a federal district court proceeding borders on the absurd.

Furthermore, the courts below based the refusal to issue a protective order on reasons beyond the Commission staff's assurances. The district court described petitioner's predictions as a "doomsday scenario," Pet. App. 7c, and observed that if it were to "acknowledge [petitioner's] highly speculative fears of damage to corporate reputation as adequate to defeat the agency's information requests, the FTC's subpoena power would be rendered powerless and serious investigation of corporate behavior would be a futile exercise." *Id.* at 8c. Similarly, the court of appeals observed that the difficulty with petitioner's contention that it will be placed "under a cloud of suspicion and speculation" was that "it could be made with respect to almost any investigation." *Id.* at 8a.

See *FCC* v. *Schreiber*, 381 U.S. at 298 ("naked assertion of possible competitive injury" insufficient to justify a judicial protective order).[12]

The district court was thus well within its discretion in refusing petitioner's request to embody the Commission staff's assurances in its formal order. The court of appeals properly refused to disturb that decision, which warrants no further review by this Court.

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[12] The decisions below are consistent with numerous cases in which courts enforcing administrative agencies' compulsory process have refused to impose limits on the manner in which agency investigators contact witnesses. See, *e.g.*, *United States* v. *Abrahams*, 905 F.2d 1276, 1285-1287 (9th Cir. 1990) (reversing order that limited IRS to examining a "representative sample" of files and required IRS to accept respondent's presence during customer interviews); *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d at 1056 (striking prefatory statement that district court had ordered be given to interviewees); *United States* v. *Newman*, 441 F.2d 165, 173-175 (5th Cir. 1971) (striking requirement that investigational target be allowed to participate in IRS interviews); *FTC* v. *Stanley H. Kaplan Educ. Center Ltd.*, 433 F. Supp. 989, 991-994 (D. Mass. 1977) (refusing to place limits on FTC's contacts with respondent's customers).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States October Term, 1992

No. 92-777

INVENTION SUBMISSION CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Invention Submission Corporation (hereinafter "ISC") submits this Reply in Support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, which Petition was filed on November 2, 1992. ISC seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the United States District Court for the District of Columbia enforcing the Civil Investigative Demands (i.e., administrative subpoenas) of the Federal Trade Commission (hereinafter "Commission").

ARGUMENT

I. Contrary To The Federal Trade Commission's Assertions, The District of Columbia Circuit Departed From Precedent By Not Requiring The Commission To Make Any Showing As To The Relevance Of Material Sought By An Administrative Subpoena, And By Imposing The Burden Of Showing Irrelevance On Petitioner.

For purposes of clarifying the issues presented to the Court by the instant case, it must be noted that the Commission's statements

in its Brief in Opposition to ISC's Petition for Certiorari regarding the history of this case are inaccurate in several respects. Commissioner Terry Calvani, in his Ruling on petitioner's Petition to Limit or Quash the Commission's administrative subpoenas, ruled that the financial information sought by the Commission was relevant "as evidence of a *possible profit motive* for the alleged misrepresentations, which bears on ISC's culpability for them". [Emphasis added] App. D to Petition, p. 13d. (Appendices to the Petition are hereinafter referred to as "App.")

Further, the financial information sought from ISC in the administrative subpoenas here at issue consisted of *only* ISC's balance sheets, income statements and gross sales. See Ruling of Commissioner Calvani, App. D. at 13d, n. 18. The more detailed financial information discussed by the Commission, in their Brief in Opposition at p. 9, is not here at issue, as the Commission admits. The Commission sought this information in *later* administrative subpoenas, which were never considered by the United States Court of Appeals for the District of Columbia Circuit, whose decision the petitioner now asks this Court to review. *Id*, n. 4.[1] Accordingly, the only question now before the Court, relative to ISC's financial information, concerns the

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[1] Petitioner contends that the Commission's reference to later administrative subpoenas not here at issue is misleading as to what is at issue in this case, and as to the bases for the Commission's relevancy arguments. Given that specific breakdowns of costs and expenses of ISC are not here at issue, the Commission's argument on this subject at p. 9 has nothing to do with any issue now before the Court. For the same reason, *Federal Trade Comm'n v. Dupont Model Management, Inc.*, 1992-1 Trade Cas. (CCH) ¶69,694 (E.D. Pa. 1992), in which financial information containing a breakdown of expenses proved that the company provided few or no services to clients, is inapposite. Further, the Commission well knows based on almost five years of investigation of ISC, that ISC has a staff which expends substantial effort in providing invention services to its clients; that ISC has an extensive computerized Data Bank of companies which have signed confidentiality agreements, and data bases of other companies, to which it sends clients' inventions; that ISC has an art department and a research department; and that ISC sends out extensive mailings to companies on behalf of its clients. ISC therefore cannot be compared to Dupont Model Management, which provided few or no services to its clients.

relevance of the general financial information initially subpoenaed by the Commission, and whether the District of Columbia Circuit applied the proper standard in determining this information to be relevant.

The United States District Court for the District of Columbia did not consider specifically whether this financial information sought by the Commission was relevant to its investigation, as set forth in the Commission's resolution. Instead, the District Court held only that "[m]easured against this general statement of the purpose of the investigation [in the Commission's resolution], the court is satisfied that all of FTC's unmet information demands are relevant." App. C at 5c. For the Commission's resolution, see *id.* at 4c.

The District of Columbia Circuit considered the relevance of financial information based on the record made before the district court, and considered the only rationale for relevance proffered by the Commission: the "profit motive" rationale.[2] The District of Columbia Circuit termed this rationale "puzzling". App. A at 7a. Nonetheless, the District of Columbia Circuit held that the financial information sought from ISC was relevant, even though the Commission's only rationale for relevance had been dismissed in this fashion by the District of Columbia Circuit. Essentially, the

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[2] The Commission states in its Brief in Opposition that it never "equated profitability alone with deceptive business practices". Brief in Opposition at p. 10. However, the Commission's contention that "lucrative returns may evidence a motive for encouraging or tolerating misrepresentations" (*Id.*) cannot be separated from the idea that profits somehow indicate misrepresentation. Given that all business in the United States operates in order to make a profit, the Commission's contention that profit indicates misrepresentation is "puzzling" indeed.

The District of Columbia Circuit's rationale that the financial information may assist the Commission in allocating its resources is plainly insupportable, given that the Commission's resolution authorizes only an investigation of ISC and its President. See, in this regard, the Petition at pp. 21-22. In addition, the idea that financial information will assist in the allocation of investigative resources again rests on the "puzzling" premise that profits somehow indicate misrepresentations.

Circuit Court held that the financial information sought by the Commission was relevant *without* requiring the Commission to proffer any rationale for relevancy whatsoever.[3] At the same time, the District of Columbia Circuit held that ". . . it is essentially the respondent's burden to show that the information [sought by an administrative subpoena] is irrelevant." *Id.* This shifting of the burden of showing irrelevance to the respondent, while requiring the agency subpoenaing information to make *no showing whatsoever*, is contrary to precedent. Rather than following the standards set by prior cases, as the Commission has argued, the District of Columbia Circuit has completely abrogated the relevancy limitation on administrative subpoenas.

As stated in the Petition for Certiorari, since the 1940's, when the courts first recognized the power of an administrative agency to issue a subpoena for investigative purposes, a relevancy limitation on such subpoenas has been recognized. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). In *Oklahoma*

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[3] The cases cited by the Commission in its Brief in Opposition at p. 5, n. 3, are inapposite. In *Securities Exchange Comm'n v. Brigadoon Scotch Distrib. Co., Inc.*, 480 F.2d 1047, 1055 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), the financial information sought by the SEC was held to be relevant to a determination as to whether financial responsibility or anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act were violated. The relevance of financial information to financial investigations under these securities acts bears little relation to the relevance of financial information to an investigation of possible misrepresentations to consumers under the Federal Trade Commission Act. The Commission's descriptions of the holdings in *Federal Trade Comm'n v. American Buyers Network, Inc.*, 1991-2 Trade Cas. (CCH) ¶69,551 at 66443 (D. Colo. 1991) and *Federal Trade Comm'n v.International Diamond Corp.*, No. C-81-29 MISC SAW (N.D. Cal. Jan. 4, 1982) are erroneous. In *American Buyers Network*, financial information was held to be relevant to the question of whether assets were being funnelled from one company to another (which is not at issue in the instant case) and to cross check other *financial* information. In *International Diamond Corp.*, an unpublished case, the court held that financial information is relevant, without stating either *what* information was sought, or *why* it was relevant. These cases are clearly inapposite to the relevancy questions in the instant case.

Press, the Court held that certain limitations on the subpoena power, including the relevancy limitation, were necessary under the Fourth Amendment. *Id.* at 208-209. It is also well recognized that an administrative agency must make a showing of relevancy of the material sought by its subpoena, in order to obtain enforcement. *United States v. Powell*, 379 U.S. 48 (1964). See Petition at pp. 11-18. The cases cited by the Commission regarding relevance of material subpoenaed by administrative agencies are consistent with these holdings.[4] While agencies conducting investigations are often given broad subpoena powers by statute, and the relevancy standards are often lenient, those standards

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[4] For example, in *United States v. Arthur Young and Co.*, 465 U.S. 805 (1984), the IRS was investigating questionable payments made by a company, and sought the company's accounting firm's records. The Court considered relevance under a statute granting access to papers which "may be relevant or material" to a tax investigation. Holding that "relevance" for investigative purposes is much broader than relevance for admissibility at trial, the Court held that tax papers of the accounting firm, which were prepared pursuant to an audit, were relevant under the statute because they might shed light on the company's tax return. In so doing, the Court carefully considered the role of the accounting firm in the company's business, and the connection of the material sought to the tax return. The Court then rejected the respondent's claims of accountant/client privilege and work product immunity. The other cases cited by the Commission which concern relevancy of material subpoenaed by agencies also involve careful application of relevancy standards under the applicable statutes, and a reasoned determination that the material sought is relevant.

Equal Employment Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54 (1984), and *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990), cited by the Commission at pp. 7-8 of their Brief in Opposition, are both inapposite. In *University of Pennsylvania*, the university conceded relevance of the subpoenaed material to the EEOC's investigation of possible employment discrimination in a tenure decision. The issue in this case was whether the university could withhold from the EEOC academic peer review information based on a claimed academic peer review privilege under the First Amendment. The Court refused to recognize such a privilege. In *Shell Oil*, the company contended that the charge of discrimination filed by the EEOC was deficient under the statute and the regulations, which contention the Court rejected. The discussion of relevance in that case is specific to the definition of relevance under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and is dictum.

nonetheless exist. In *Federal Trade Comm'n v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977), the court stated that an administrative agency did not have to state a specific theory of relevancy of subpoenaed material at the investigatory stage. Nevertheless, the court carefully considered the relevance of the material sought in light of the Commission's resolution authorizing compulsory process, and accepted the Commission's rationale for relevancy of certain materials which it sought. The court in *Texaco* did not place the burden of showing irrelevance on respondents, and did relieve the agency of the requirement of showing relevance. *Id.* at 873-874, 876-877, n. 32. In its Brief in Opposition, the Commission attempts to equate the holding in *Texaco* that an agency need not state a specific theory of violation of the law, with the District of Columbia Circuit's holding that, essentially, an agency subpoenaing material need make no showing of relevancy. The two cannot be equated.

The District of Columbia Circuit's decision in the instant case has vitiated the relevancy limitations on administrative subpoenas to the point where, for all practical purposes, they cease to exist. Under this Circuit Court's decision, a business is completely without protection from the "officious intermeddling"[5] of an administrative agency which, exceeding its statutorily authorized investigative powers, attempts to delve into records having nothing to do with its investigation. Accordingly, petitioner requests that the Court grant certiorari.

II. The District of Columbia Circuit's Decision in the Instant Case Conflicts with the Fifth Circuit's Decision in *Federal Trade Comm'n v. Turner*

Contrary to what the Commission has argued at pp. 12-16 of its Brief in Opposition, *Federal Trade Comm'n v. Turner*, 609 F.2d 743 (5th Cir. 1980), has been previously interpreted by the Commission as preventing the Commission from subpoenaing financial information in the context of an investigation of possible

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[5] See *Oklahoma Press, supra*, 327 U.S. at 213.

misrepresentations. In *In re Rome Finance Co.*, File No. 862-3090 (March 25, 1988) (App. F), Commissioner Terry Calvani, the same Commissioner who ruled in the instant case, ruled on a Petition to Quash administrative subpoenas. As in the instant case, the authority to rule on this Petition was delegated to a single Commissioner, under the Commission's rules. See Brief in Opposition at p. 3. Based on *Turner*, Commissioner Calvani ruled that the Commission *cannot* obtain financial information at the investigative stage, but instead can obtain such information only after it has established liability and obtained a judgment. App. F at 3f-4f.[6]

The Commission's statements regarding *Turner*, that it deals only with subpoenas by the Commission seeking information for purposes of determining the feasibility of redress, are therefore contrary to the Commission's prior interpretation of that case in *Rome Finance*. *Turner* holds that the Commission may not subpoena financial information, and the District of Columbia Circuit's decision in the instant case is therefore in conflict with *Turner*. Accordingly, petitioner requests the Court to grant certiorari.

III. The District of Columbia Circuit Erred In Holding That Compliance With The Administrative Subpoenas Would Not Be Unduly Burdensome To ISC, Based On the Commission's Unsupported Assurances, While Providing ISC With No Protection From Undue

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[6] Whether financial information is relevant to the Commission's investigation of proposed mergers of corporations has nothing to do with the instant case. The power of the Commission to obtain information under the sections of the Federal Trade Commission Act empowering it to prevent and investigate unfair consumer practices, 15 U.S.C. §§45(a) and 57b-1, has nothing to do with its power to obtain information under the completely separate antitrust provisions of the Act at 15 U.S.C §1312. Further, there are obviously different relevancy considerations in an antitrust investigation and an investigation of possible misrepresentations to consumers. Antitrust issues have no bearing on the instant case, and the Commission's reference to mergers at p. 15, n. 11 of its Brief in Opposition represents another attempt to obscure the issues in this case.

Burden.

As stated in the Petition for Certiorari, at pp. 25-26, an administrative subpoena must be reasonable in order to comply with the Fourth Amendment. In order to be reasonable, such a subpoena may not be unduly burdensome to the respondent, i.e., compliance with the subpoena may not "threaten[ ] to unduly disrupt or seriously hinder the normal operations of a business". *Texaco*, *supra*, 555 F.2d at 882. ISC contends that providing contact information on customers, advertising media and the companies in the Data Bank to which ISC sends information on clients' inventions, would be unduly burdensome under *Texaco*, as the Commission's unrestricted contacts with these persons and entities would place ISC under a cloud of suspicion, causing them to cease dealing with ISC. The United States District Court for the District of Columbia held that there was no undue burden to ISC under *Texaco*, based on assurances of the Commission as to its intended use of the subpoenaed information. App. C at pp. 7c-8c. The District of Columbia Circuit affirmed that holding. App. A at 7a-8a.

ISC has been required to provide information which it contends will unduly disrupt and seriously hinder the normal operations of its business, without any protection from this undue burden except the unsupported assurances of the staff of the Commission's Boston office.[7] Rather than seeking a protective order restricting the Commission's investigation, which the District Court would have no power to grant, ISC seeks a modification of the administrative subpoenas to provide it with protection against subpoenas which are unreasonable, under the *Texaco* standard and under the Fourth Amendment.[8]

The District of Columbia Circuit held that there is a

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[7] As stated in the Petition for Certiorari at p. 26, n. 9, ISC cannot be certain that the assurances of the staff in the Boston office of the Commission are in any way binding on the Commission.

[8] As to Fourth Amendment limitations on administrative subpoenas, see *Oklahoma Press*, *supra*, 327 U.S. at 208-209, cited in the Petition for Certiorari at pp. 11-12.

presumption of administrative regularity, entitling the Commission to have its assurances taken at face value, and that, therefore, modification of the administrative subpoenas was unnecessary. App. A at 8a-9a. Precedent does not support the proposition that such a general presumption of administrative regularity exists, entitling any government agency to have its unsupported statements taken at face value, even in an adversarial proceeding. Such a presumption of regularity applies only to formal agency proceedings such as rulemaking proceedings, and agency compliance with statutory requirements, and this presumption is limited to those contexts.[9] The unsupported assurances of an

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[9] See, e.g., *Federal Communications Comm'n v. Schreiber*, 381 U.S. 279 (1965) (The district court incorporated confidentiality requirements in its order enforcing the administrative subpoenas, despite agency confidentiality rules, and the circuit court affirmed. The Supreme Court overturned these rulings because the FCC had made a decision on treatment of confidential information, pursuant to confidentiality rules formulated under its statutory rulemaking authority. The Court applied the presumption of administrative regularity to the FCC's decision, made in accordance with its rules, in holding that further protection of confidential information was unnecessary.) See also *Exxon Corp. v. Federal Trade Comm'n*, 665 F.2d 1274 (D.C. Cir. 1981) (An order protecting confidential information was issued by an administrative law judge, in accordance with rules made pursuant to the agency's statutory rulemaking authority. The court held that sufficient protection for confidential information had been provided.) As to *Federal Trade Comm'n v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966 (D.C. Cir. 1980), see the Petition for Certiorari at pp. 27-28.

Insofar as *Federal Trade Comm'n v. Stanley H. Kaplan Educ. Center Ltd.*, 433 F. Supp. 989 (D. Mass. 1977), holds that there is a presumption of administrative regularity which is generally applicable, petitioner contends that the case was wrongly decided, and is unsupported by precedent.

United States v. Chemical Found., Inc., 272 U.S. 1 (1926) is inapposite. This sixty-six year old case has to do with the authority of a presidential appointee to seize and sell German patents during World War I, under the Trading with the Enemy Act of 1917. The presumption of administrative regularity was applied to the actions of this appointee, exercising the presidential war power. Clearly, the same presumption is not applicable here. Further, the validity of this case has been affected by due process decisions of the Court in the intervening sixty-six years. This case and *Kaplan* do not support the proposition that the general presumption of administrative regularity is well-recognized outside the context of agency rules and rulemaking, despite the Commission's

employee of the Commission should not be considered sufficient protection from an undue burden on ISC, given that ISC has a Fourth Amendment right to protection from an unreasonable subpoena. Petitioner therefore requests the Court to grant its Petition for Certiorari.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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contentions to the contrary at pp. 16-17 of the Brief in Opposition.